(1)

No. 88-7194-CFY
Status: GRANTED

Title: Arthur Lajuane Taylor, Petitioner
v.
United States

Docketed:
May 6, 1989

Court: United States Court of Appeals
for the Eighth Circuit

See also:
88-1885
88-7307
88-7398
88-7509
88-7590

Counsel for petitioner: Livingston,Bruce

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	May 6 1989	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Jun 8 1989		Order extending time to file response to petition until July 10, 1989.
5	Jul 10 1989		Brief of respondent United States in opposition filed.
6	Jul 13 1989		DISTRIBUTED. September 25, 1989
7	Sep 14 1989		Reply brief of petitioner Arthur Taylor filed.
9	Sep 29 1989		REDISTRIBUTED. October 6, 1989
11	Oct 10 1989		Petition GRANTED.
			**********
12	Oct 23 1989	G	Motion of petitioner for appointment of counsel filed.
13	Oct 30 1989		DISTRIBUTED. NOV. 3, 1989. (MOTION FOR APPOINTMENT OF COUNSEL).
14	Oct 30 1989		Record filed.
		*	3 vol.-USCA 8 received.
15	Nov 6 1989		Motion for appointment of counsel GRANTED and it is ordered that Bruce Livingston, Esquire, of St. Louis, Missouri, is appointed to serve as counsel for the petitioner in this case.
17	Nov 24 1989		Brief amicus curiae of Natl. Association of Criminal Defense Lawyers filed.
16	Nov 27 1989		Joint appendix filed.
18	Dec 11 1989		Brief of petitioner Arthur Taylor filed.
22	Dec 29 1989	X	Brief of respondent United States filed.
19	Jan 5 1990		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 28, 1990. (4TH CASE)
20	Jan 18 1990		CIRCULATED.
21	Feb 2 1990	X	Reply brief of petitioner Arthur Taylor filed.
23	Feb 28 1990		ARGUED.

EDITOR'S NOTE:

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88-7194

No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

ARTHUR LAJUANE TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner Arthur Lajuane Taylor, through his court appointed attorney, Bruce Dayton Livingston, moves this Court for leave to proceed *in forma pauperis*. In support of his motion petitioner states that Mr. Livingston has been his appointed counsel under the Criminal Justice Act of 1964, as amended, before both the United States District Court for the Eastern District of Missouri and the United States Court of Appeals for the Eighth Circuit. Because Mr. Livingston was appointed as counsel by both the district court and the court of appeals, it was not necessary to seek leave to proceed *in forma pauperis* in either of those courts.

Respectfully submitted.

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Attorney for Petitioner

No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

ARTHUR LAJUANE TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRUCE DAYTON LIVINGSTON
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QUESTION PRESENTED

This is a statutory interpretation case. Petitioner Arthur Lajuane Taylor, having been convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g), was sentenced to severely enhanced punishment under 18 U.S.C. § 924(e)(1) as a person "with three previous convictions . . . for a violent felony." Section 924(e)(2)(B) defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year that . . . (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Section 924(e) fails to define "burglary" despite its diverse meanings under federal, state or common law. In a 2-1 decision, the court of appeals declared that petitioner's prior Missouri convictions for burglary in the second degree satisfied section 924(e)'s predicate "violent felony" offenses and concluded "that 'burglary' in the sentence enhancement statute means 'burglary' however a state chooses to define it."

The question presented is whether the court of appeals erred in holding that under 18 U.S.C. § 924(e) a "violent felony" included any crime labeled a "burglary" by any state, even though (1) Supreme Court precedents establish that when a term with an established common law meaning, like "burglary", is used without definition in a federal statute, *e.g.*, 18 U.S.C. § 924(e), the common law meaning is presumed to have been intended by

Congress; (2) some conduct labeled a "burglary" in one state would not be subject to sentence enhancement had it occurred in other states, where it would be denominated as "storehouse breaking" or "breaking and entering" and otherwise would not threaten others with a serious risk of physical injury; and (3) Congress specifically *deleted* a broad definition of burglary that would have included petitioner's prior convictions from the sentence enhancement statute?

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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

ARTHUR LAJUANE TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Arthur Lajuane Taylor respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-6a) is reported at 864 F.2d 625. A transcript of the Sentencing Proceedings before the district court (Nangle, C.J.) is attached in the appendix (App. B, *infra*, 7a-16a).

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1989. (App. C, *infra*, 17a). The court of appeals denied petitioner's request for rehearing or rehearing en banc on March 7, 1989. (App. D, *infra*, 18a).

Petitioner seeks this Court's review by certiorari pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Introduction. The question presented by this Petition involves the statutory interpretation of the meaning of the term "violent felony," as used in the Federal statute providing for a severely enhanced penalty when persons convicted of being felons in possession of a firearm under 18 U.S.C. § 922(g) have "three previous convictions . . . for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1) (Supp. IV 1986). Specifically at issue, is whether Congress' use of the undefined term "burglary" in the definition of "violent felony," 18 U.S.C. § 1924(e)(2)(B)(ii) (Supp. IV 1986), can be construed to encompass any or all of the varying meanings of the term "burglary" under state, federal and common law. It is a question upon which the courts of appeal are in sharp conflict. Moreover, in this case the court of appeals' opinion is in direct conflict with established precedent of this Court.

Here, a divided panel of the court of appeals (McMillian & Fagg, JJ., with Bright, J., dissenting) held that "burglary," as used by Congress in the definition of "violent felony" in section 924(e)(2) was unambiguous and "means 'burglary' however a state chooses to define it." *United States v. Taylor*, 864 F.2d 625, 627 (8th Cir. 1989) (App. 3a). The panel majority reached this conclusion notwithstanding that the conduct which would be labeled a "burglary" in some states, *e.g.*, Missouri, would not be so denominated in certain other states, *e.g.*, Maryland or Arkansas. The Fourth Circuit has already concluded that conduct labeled "storehouse breaking" in Maryland is not a violent felony within the meaning of 18 U.S.C. § 924(e). *United States v. Headspeth*, 852 F.2d 753 (4th Cir. 1988).

Moreover, the majority was able to ignore the legislative history of section 924(e) by concluding essentially that all burglaries are the same. 864 F.2d at 627 (App. 31). In finding "burglary" to be unambiguous, the panel failed to examine the differences between the various crimes labeled burglary. As Judge Bright noted in dissent, the range of conduct in contemporary offenses labeled a burglary is significantly different from the common law: the breaking and entering of a dwelling of another in the nighttime with the intent to commit a felony. *Id.* Had the majority bothered to examine the legislative history of section 924(e), it would have realized that Congress had specifically *deleted* a broad definition of burglary from

the statute which was nearly identical to the burglary convictions relied upon by the majority and which otherwise would have included most state law burglaries. *Id.* at 628 (App. 4a).

Finally, the majority opinion ignored the established Supreme Court precedent that when federal statutes use undefined terms which have an accepted common law meaning, it is presumed that Congress intended the common law meaning to control. 864 F.2d at 627 (App. 31) (Bright, J., dissenting) (citing *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981)). *Cf. Headspeth*, (undefined term "burglary" in 18 U.S.C. § 924(e) presumed to adopt common law meaning). Here again there is a split within the circuits on the meaning of burglary used in the statutory definition of a "violent felony" under section 924(e).

We discuss below the conflict among the circuits and the need for a definitive resolution by this Court (see pages 11 - 16 *infra*). First, however, we briefly describe the findings and conclusions below.

2. Proceedings in the District Court. Petitioner pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) on January 15, 1988. *See* Plea Agreement (App. E, *infra*, 19a-22a). As a condition of defendant's agreement to plead guilty, petitioner retained the right to appeal, solely upon the issue of whether he had the

requisite convictions for "violent felonies" that would subject him to punishment enhancement under 18 U.S.C. § 924(e)(1). *See* Transcript of Sentencing Proceedings (App. 8a). At petitioner's sentencing on March 2, 1988, the district court Nangle, C.J., denied petitioner's Motion to Strike respondent's Notice of Punishment Enhancement pursuant 18 U.S.C. § 924(e), (App. 16a), and sentenced petitioner to a term of fifteen (15) years imprisonment without possibility of parole pursuant to the enhancement statute. (App. 15a).

3. Proceedings in the Court of Appeals. Petitioner appealed to the Eighth Circuit on the sole issue of whether his sentencing pursuant to the enhancement statute, 18 U.S.C. § 924(e), was proper and argued that his convictions for burglary in the second degree under Missouri law, Mo. Rev. Stat. § 569.170, were not "violent felonies" under the enhancement statute. Accordingly, petitioner argued that he should have been sentenced under the provisions of former section 924(a)(1), 18 U.S.C. § 924(a)(1) (Supp. IV 1986), *subsequently amended* 18 U.S.C.A. § 924(a)(1) (West Supp. 1989).[1] By a 2-1 margin the court of appeals affirmed the district court's sentence. 864

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[1]Under former section 924(a)(1), Taylor was subject to a *maximum* sentence of five (5) years imprisonment *with* the possibility of parole.

F.2d at 627 (App. 3a). The panel majority found that petitioner's convictions for burglary in the second degree were indeed predicate offenses for sentence enhancement within the definition of "violent felony" in section 924(e)(2)(B), and that the modification of "violent felony" by the word "burglary" "means 'burglary' however a state chooses to define it." *Id.*

In dissent, Judge Bright disagreed with the majority's conclusion after "careful examination of the federal statute and its legislative history." *Id.* Instead, Judge Bright concluded that because "burglary" was not defined anywhere in the statutory framework of section 924(e), Congress must have intended to apply the common law meaning of burglary in the sentence enhancement statute. *Id.* Moreover, Judge Bright criticized the majority opinion because it led to the anomalous result that identical conduct would lead to dramatically different sentences based solely upon the nomenclature entitling an offense, rather than based upon the underlying conduct itself. "I do not believe the application of a federal sentence enhancement provision should turn on the differing labels given to similar conduct by the various states." *Id.* at 628 (App 4a).

Judge Bright extensively analyzed the legislative history of the sentence enhancement statute and determined that it was intended to include as predicate offenses only those burglaries which "[present] a serious potential risk of injury to the person." *Id.* at 629 (App. 5a). He found it particularly

persuasive that Congress had specifically *deleted* a broad definition of burglary which would have included petitioner's convictions as predicate offenses for sentence enhancement. *Id.* In reaching this conclusion, Judge Bright also relied upon and quoted extensively the directly conflicting opinion of the Fourth Circuit in *United States v. Headspeth*, 852 F.2d 753 (4th Cir. 1988). *Headspeth* held that "Congress intended to revert to the narrow common law definition of burglary in the amended statute." 852 F.2d at 758.

Finally, Judge Bright held that Missouri's second degree burglary offense did not fall within the catch-all statutory phrase of § 924(e) "or otherwise involves conduct that presents a serious risk of physical injury to another." 864 F.2d at 629 (App. 5a) (again relying extensively upon *Headspeth* and quoting extensively at 852 F.2d at 758-59).

Judge Bright also analyzed the Missouri statutory framework and concluded that burglary in the second degree was not a violent felony:

> Missouri law, by definition, distinguishes burglaries which are potentially violent and those not showing violence or threats of violence. Burglary in the first degree encompasses entry into a building when armed or when the burglar causes or threatens physical injury to a person not a participant in the crime, or where a person other than a participant is present in the building. In contrast, burglary in the second degree quoted in the majority opinion at 626, may relate to an unarmed burglary of an unoccupied building.

> Thus, the conviction for second degree burglary under Missouri law, relating as it does to entry into a structure without an occupant, poses no threat of harm to persons.

864 F.2d at 630 (App. 6a) (citations omitted). Judge Bright then concluded that this case "needs re-examination . . . by the United States Supreme Court." *Id.*

REASONS FOR GRANTING THE PETITION

In conflict with the decisions of this Court and of other courts of appeal, the court of appeals in this case incorrectly decided questions of great importance to the administration of the criminal penalty laws. The unwarranted extension of severely enhanced criminal penalties to a large number of persons threatens to overburden the nation's prison system in a manner not contemplated by Congress, while at the same time overburdening the nation's judicial system with numerous appeals arising from the confusing and conflicting interpretation of the penalty enhancement provision by the various courts of appeal.

This Court has held that when a term with an accepted common law meaning, such as burglary, is used in a federal statute without definition, it is presumed that Congress intended that the common law definition should apply. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); *Morissette v. United States*, 342 U.S. 246, 263 (1952). With respect to the specific term and statute at issue in this case, the panel majority' interpretation directly conflicts with other recent court of appeals cases.

See, e.g., United States v. Headspeth, 852 F.2d 753, 757-58 (4th Cir. 1988).

Application of the majority's opinion also reaches the anomalous result that when conduct which is labeled a burglary in Missouri takes place in states which label such conduct something other than burglary, *i.e.*, "breaking and entering" or "storehouse breaking," that conduct would not be subject to punishment enhancement under § 924(e) merely because of where it took place, and not because of the substantive conduct itself. *See, e.g.* Ark. Rev. Stat § 5-39-202 (breaking and entering); Md. Crim. L. Code Ann. § 31B (1986) (breaking and entering storehouse). If this Court were to allow such an unintended, unwise and seemingly unconstitutional interpretation to stand, it will be deluged with numerous appeals in similar cases.

The circuits are in total disarray on the appropriate interpretation of the sentence enhancement provision of 18 U.S.C. § 924(e), adopting no fewer than four different approaches to this issue. Review by this Court is needed to abate this confusion. Review of this case is particularly appropriate for several reasons. First, because it was appealed solely on the question of law respecting the interpretation of the sentencing enhancement provision of § 924(e), it is less limited by facts peculiar to one specific case. Second, the approach adopted by the majority opinion of the panel directly conflicts with both

established Supreme Court precedent and the expressed intention of Congress in the legislative history.

Finally, burglaries that give rise to sentence enhancement in this case occurred in 1963 and 1971. (App. 13a). These supposedly "violent felonies" were found by a dissenting judge from the court of appeals to be non-violent by definition under the Missouri statutory framework.[2] 864 F.2d at 630 (App. 6a). Given the 43 year-old petitioner's age, his sentence barely exceeds his life expectancy. Based upon the age of the convictions at issue, and the dubious (non-existent) potential for violence under those offenses as defined under Missouri law, it would be a grave miscarriage of justice to allow petitioner to remain incarcerated without opportunity for parole for the next fifteen (15) years. Accordingly, a review by this Court is warranted.

A. The Conflict Among the Circuits Requires Resolution by this Court.

As Judge Bright recognized in dissent from the court of

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[2]The statutory framework for burglary under Missouri law ascribes all conduct which is potentially violent into the charge of burglary in the first degree. Petitioner's convictions were for burglary in the second degree, which by definition can only be unarmed burglaries of unoccupied buildings without any threat of injury to non-participants. *Compare* Mo. Rev. Stat. § 569.160 (1986) *with id.* § 569.170.

appeals' opinion, the circuits are in conflict on the question of the proper statutory interpretation of the definition of "violent felony" in the sentence enhancement provision of 18 U.S.C. § 924(e). Although Judge Bright relied primarily upon *United States v. Headspeth*, 852 F.2d 753 (4th Cir. 1988), the conflict in the circuits is far more pervasive than a simple conflict between the Fourth and Eighth Circuit.

Four different approaches to the problem of interpreting the sentence enhancement provision of § 924(e) have been established by various courts of appeal. The Eighth and Seventh Circuits have held that any burglary is a predicate offense under § 924(e). *United States v. Portwood*, 857 F.2d 1221, 1223-24 (8th Cir. 1988) ("burglary" means any crime that a state chooses to label "burglary"); *United States v. Dickerson*, 857 F.2d 414, 419 (7th Cir. 1988) ("all burglaries satisfy the prerequisites of § 924"). The Ninth Circuit, in contrast, stated that "we look to the federal definition when determining whether a defendant was convicted of a violent felony." *United States v. Sherbondy*, 865 F.2d 996, 1005 (9th Cir. 1988).

Remarkably, the Eleventh Circuit interpreted "burglary" to mean "any burglary that would have met the definition of burglary under the previous act." *United States v. Hill*, 863 F.2d 1575, 1582 (11th Cir. 1989). By "previous act," the Eleventh Circuit was referring to 18 U.S.C. (App. II) § 1202 (repealed), which defined burglary as "'any felony consisting of entering or

remaining surreptitiously within a building that is property of another within the intent to engage in conduct constituting a federal or state offense.'" *Id.* at 1578. The Eleventh Circuit's interpretation is particularly surprising because Congress specifically deleted that definition of burglary from present § 924(e) as part of its effort to change the statute's focus from "robbery" and "burglary" to "violent felonies." Congress' affirmative act in deleting the broad definition of burglary reflects its intent that only those burglaries which posed a serious risk of physical injury to others were to remain as predicate offenses for enhanced punishment. *See Headspeth*, 852 F.2d at 758.

As Judge Bright stated in dissent in this case, "*Headspeth's* analysis of the legislative history is instructive and dispositive." 864 F.2d at 628 (App 4a).

> At one point, § 924(e) did indeed contain a definition of burglary which would encompass Maryland's storehouse breaking offense. As originally enacted, § 924(e)'s sentence enhancement provision was triggered only by previous convictions for either 'robbery' or 'burglary.' Section 924(e)(B) then specifically defined 'burglary' as 'any crime punishable by a term of imprisonment exceeding one (1) year and consisting of entering or remaining surreptitiously within a building that is the property of another with intent to engage in conduct constituting a Federal or State offense.' This definition of burglary, which was considerably broader than its common law counterpart, would of course cover storehouse breaking, as that offense is defined in Maryland.

> But, this broad statutory definition of burglary was extremely short-lived. Two days after § 924(e) was enacted -- and several months before it became effective -- Congress began to consider expanding the list of predicate offenses that would trigger it. *See* Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 before the Subcomm. on Crime of the House Com. on the Judiciary, Ninety-Ninth Cong., 2d Ses. 44 (May 21, 1986) [hereinafter Hearing] at the ensuing hearings, there was a general consensus that the specific predicate offenses of 'robbery' and 'burglary,' together with their respective definitions, should be replaced with the more general terms 'serious drug offense' and 'violent felony.' *See* H.R. Rep. No. 849, Ninety-Ninth Cong., 2d Ses. 3 (1986). There was considerable disagreement, though, about how to define the term 'violent felony.'
>
> * * *
>
> Though the amended statute lists burglary as a predicate offense, it specifically deletes the broad definition of that term which had appeared in the original version of the statute. This omission, viewed in light of the efforts to remove burglary altogether from the list of predicate offenses, suggests that Congress intended to revert to the narrow common law definition of burglary in the amended statute. The common law definition is, to be sure, more consistent with the amended statute's focus on conduct which poses a serious potential risk of injury to the person. Absent more persuasive evidence that Congress intended the term 'burglary' in amended § 924(e)(2)(B) to mean something else, we are reluctant to depart from the usual presumption that Congress intended the term to be given its common law meaning.

Headspeth, 852 F.2d at 757-58. (Footnote omitted). Thus, the other approach in the courts of appeal, as advanced by the Fourth Circuit, directly contradicts the Eleventh Circuit's

reference back to a repealed federal statute for the definition ot burglary. *See Id.*

The Fourth Circuit approach also concludes that "we hold that the term 'burglary' as used in § 924(e)(2)(B)(ii), means the breaking and entering of the dwelling house of another, in the nighttime, with the intent to commit a felony therein. So defined, the term 'burglary' does not encompass storehouse breaking, as that offense is defined in Maryland law." *Id.* at 758. Accordingly, the approach of the Fourth Circuit to the statutory interpretation problem presented by § 924(e) is to presume the common law meaning of burglary as the meaning intended by Congress in enacting the sentence enhancement provision of § 924(e).[3]

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[3]The term "burglary" has no fixed, universally-accepted and applicable definition. At common law, "burglary" defined a specific offense, the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony. *See* 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.13 (2d ed. 1987) at 464. In contrast, modern statutory revisions of the offense, "when viewed in totality ha[ve] resulted in a modern crime which has little in common with its common law ancestor except for the title of burglary." *Id.* at 476. "Twenty-six states varied the degree of the burglary by the type of structure, whether the structure was occupied, when the burglary occured and/or whether injury occured or was threatened." *Hill*, 863 F.2d at 1582 n.5 (collecting statutes). Present federal law is so divorced from the common law crime and from a crime involving serious potential risk of physical injury to another that one may be guilty of "burglary" if he or she merely "breaks the seal or lock . . . of any pipeline system containing interstate or foreign shipments of freight." 18 U.S.C. § 2117. Clearly, if such non-violent forms

(Footnote Continued)

As the foregoing summary demonstrates, the lower courts are in need of guidance on the proper interpretation of § 924(e) with respect to what convictions constitute predicate offenses for penalty enhancement. Some circuits look to federal law; some circuits look to state law; others look to the common law in interpreting which burglary convictions are subject to categorization as "violent felonies" under § 924(e). The previous holdings in this case by the district court and court of appeals present clear, unambiguous holdings which conflict with other courts of appeal, Congressional intent as expressed in the legislative history of the statute, and established Supreme Court precedent. Moreover, this case presents the issue that must be resolved without a cluttered fact situation and therefore is well suited to enable this Court to provide the necessary guidance.

B. This Court's Precedents Require that Only Common Law Burglaries May Qualify as Predicate Offenses Under § 924(e), Because Burglary is Undefined in the Statute and Hence Must Be Presumed to Have Been Intended by Congress to Have Its Common Law Meaning.

The Fourth Circuit's conclusion in *Headspeth* that Congress intended to revert to the common law definition of "burglary" follows from a long-established rule of statutory

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(Footnote Continued)
of burglary are defined under the Federal law, Congress cannot have intended such crimes to fall within the definition of "violent felony" which would subject someone convicted thereunder to sentence enhancement under § 924(e).

construction employed by this Court. In *United States v. Turley*, 352 U.S. 407 (1957), this Court stated that when: "A federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning." *Id. at 411. Accord NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); *Morissette v. United States*, 342 U.S. 246, 263 (1952); *United States v. Headspeth*, 852 F.2d at 757.

As noted, § 924(e) does not define "burglary," which is a common law term of well-established meaning. *See Headspeth*, 852 F.2d at 757. By its very nature, common law burglary "presents a serious offense or risk of physical injury to another." *See Id.* at 759. Accordingly, the common law definition is entirely consistent with Congress' emphasis in § 924(e) on "violent felony."

The Fourth Circuit's holding in *Headspeth* is also consistent with another well-established rule of construction that this Court employed in *Turley*: "[I]n the absence of a plain indication of an intent to incorporate diverse state law into a federal criminal statute, the meaning of the federal statute should not be dependent on state law." 352 U.S. at 411. *See Sherbondy*, 865 F.2d at 1005 (rejecting state law as controlling § 924(e)'s definition of "violent felony"). No such "plain indication" of an intent to incorporate all state

burglaries into the federal law definition of "violent felony" appears in § 924(e)'s legislative history.

In this case the panel majority's construction of the term burglary in § 924(e) violates this Court's well-established rules of statutory construction, as well as Congress' expressed intent.

CONCLUSION

In summary, this case presents the opportunity to establish clear guidelines for the lower courts on the proper interpretation of the term "violent felony" in 18 U.S.C. § 924(e)(1), as defined by the term "burglary" in § 924(e)(2)(B)(ii). The panel majority's interpretation conflicts with Supreme Court precedent, decisions of other courts of appeals, as well as Congress' expressed intent.

Moreover, if the panel majority's interpretation is allowed to stand, it raises grave Constitutional implications. Although most states differentiate between "violent" and "non-violent" burglaries by assigning lesser degrees to less offensive conduct, some states do not even identify a crime as "burglary" when it involves non-violent, unarmed break-ins to unoccupied buildings. Thus, under the panel majority's decision, sentence disparity would arise based solely on the variation in titles of the offense in different states.

Petitioner's prior burglary convictions simply do not constitute violent felonies, in actuality and under § 924(e)(1). Consequently, the district court erred in sentencing petitioner under § 924(e) and the Eighth Circuit erred in affirming the sentence.

For the reasons stated in this Petition, petitioner respectfully requests that the Court grant the Petition for Writ of Certiorari.

DATED this 6th day of May, 1989.

Respectfully submitted.

Bruce Dayton Livingston

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tient relationship existed between Dr. Monaghan and Vera Robinson at the time the latter sought insurance coverage from State Farm. The judgment of the district court granting summary judgment on Counts I and II [2] is reversed and this portion of the case is remanded to the district court for further proceedings.[3]

We agree with the district court's conclusion that plaintiff's factual pleading as to negligently inflicted emotional distress does not state a cause of action under Nebraska law. *See James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985). The judgment is affirmed as to the dismissal of Count III; judgment is reversed and remanded as to Counts I and II. Costs assessed against plaintiff.[4]

UNITED STATES of America, Appellee,

v.

Arthur Lajuane TAYLOR, Appellant.

No. 88-1408.

United States Court of Appeals, Eighth Circuit.

Submitted Sept. 19, 1988.

Decided Jan. 4, 1989.

Rehearing and Rehearing En Banc Denied March 7, 1989.

Defendant pled guilty to possession of firearm by convicted felon. The United States District Court for the Eastern District of Missouri, John F. Nangle, Chief Judge, enhanced defendant's sentence because of his previous felony convictions, including second-degree burglary conviction, and defendant appealed. The Court of Appeals, McMillian, Circuit Judge, held that defendant's sentence was properly enhanced by second-degree burglary conviction pursuant to statute allowing enhancement when defendant has three prior convictions for either violent felony or serious drug offense.

Affirmed.

Bright, Senior Circuit Judge, filed dissenting opinion.

Criminal Law ⇐1202.5

Defendant's prior second-degree burglary conviction was "violent felony" for purpose of statute allowing enhancement of sentence if defendant had three previous convictions for either "violent felony or a serious drug offense," even though elements of first-degree burglary, rather than second-degree burglary, under Missouri law referred to potential for violence, where statute defining "violent felony" stated that burglary was "violent felony". 18 U.S.C.A. § 924(e)(1), (e)(2)(B); V.A.M.S. §§ 569.160, subd. 1(3), 569.170, subd. 1.

Bruce D. Livingston, St. Louis, Mo., for appellant.

David M. Rosen, St. Louis, Mo., for appellee.

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and FAGG, Circuit Judge.

2. Counts I and II are identical except that Count II states a claim against the defendant on the grounds of respondeat superior.

3. On remand, before further proceedings, we think it incumbent upon plaintiff to produce for the court's inspection the actual medical bills incurred. If these bills are not in excess of $10,000 exclusive of costs and interest then the district court should dismiss plaintiff's claim for lack of jurisdiction.

4. We feel counsel could have avoided the lengthy process of appeal had he simply filed a response by affidavit, as ordered by the district court, instead of relying on his technical legal right. The district court was looking for help and did not receive it. At least counsel could have better served his client's interests and assisted an overburdened district court with factual information. The fact remains that "Exhibit A" is only barely legible even on the copy filed here.

APPENDIX A

McMILLIAN, Circuit Judge.

Arthur Lajuane Taylor pleaded guilty in the District Court [1] for the Eastern District of Missouri to one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). The district court enhanced Taylor's sentence under 18 U.S.C. § 924(e)(1) because of his previous felony convictions and sentenced him to fifteen years in prison with no possibility of probation or parole. For reversal, Taylor argues that the district court erred in considering his prior convictions for burglary in the second degree under Missouri law for purposes of the sentence enhancement provisions of 18 U.S.C. § 924(e)(1). For the reasons discussed below, we affirm the sentence imposed by the district court.

Taylor appeals only from the imposition of the enhanced sentence.[2] Because the imposition of the sentence arose out of a guilty plea pursuant to a plea agreement, there are no disputed factual issues. The issue on appeal is one of law only.

We have recently considered the issue of whether burglary in the second degree is a "violent felony" in *United States v. Portwood*, 857 F.2d 1221 (8th Cir.1988) and *United States v. Black*, 857 F.2d 1221 (8th Cir.1988) (consolidated for appeal, hereinafter *Portwood*). The reasoning of *Portwood* applies with equal weight to this case.

The sentence enhancement provisions of 18 U.S.C. § 924(e) come into play when one who has been convicted under 18 U.S.C. § 922(g)(1) has three previous convictions for either a "violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). The statute defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year that—

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B).

Burglary in the second degree is defined in the Missouri Revised Statutes as:

> knowingly enter[ing] unlawfully or knowingly remain[ing] unlawfully in a building or inhabitable structure for the purpose of committing a crime therein

Mo.Rev.Stat. § 569.170.1.

As a felony, burglary in the second degree is punishable by imprisonment for a term of more than one year. Mo.Rev.Stat. § 556.016.2. The Missouri statutory definition of burglary in the second degree falls squarely within the crimes delineated in 18 U.S.C. § 924(e) as predicate crimes which are to be considered for sentence enhancement purposes.

Taylor argues, however, that burglary in the second degree is not a "violent felony ... that ... involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). The gist of his argument is that Missouri law distinguishes between burglary in the first degree which involves the potential for violence and burglary in the second degree which does not. According to Taylor, if any burglary presents a risk of potential injury to an innocent person, it automatically triggers the application of the more serious charge of burglary in the first degree. Mo.Rev.Stat. § 569.160.1(3). In contrast, a charge of burglary in the second degree is triggered when a burglary of an empty building occurs. Mo.Rev.Stat. § 569.170. Taylor argues that such a burglary carries with it no potential for violence since there is no one present who can be harmed during the commission of the offense. As such, he argues that burglary in the second

1. The Honorable John F. Nangle, Chief Judge, United States District Court for the Eastern District of Missouri.

2. A ruling favorable to Taylor on this issue would necessitate a remand for resentencing under 18 U.S.C. § 924(a)(1). A prerequisite to sentence enhancement under 18 U.S.C. § 924(e)(1) is three previous convictions. The prior convictions relied upon by the district court in imposing the enhanced sentence were two for burglary in the second degree, one for robbery in the first degree and one for assault.

degree cannot be a "violent felony" in the sense that Congress intended when it enacted 18 U.S.C. § 924(e)(2)(B).

In response to an argument identical to the one posed by Taylor, we held in *Portwood* that "burglary" in the sentence enhancement statute means "burglary" however a state chooses to define it. We stated that:

> Congress could quite reasonably conclude that no matter what the felon's intent upon breaking in, the property owner may return, a neighbor may investigate, or a law enforcement official may respond. All of these scenarios present a grave threat of harm to persons. A person with ... prior convictions for burglary, regardless of the details of each burglary, presents the type of potential threat to society that Congress sought to control by the enactment of § 924(e).

857 F.2d at 1224. Based on the reasoning of *Portwood*, we hold that the district court did not err in considering Taylor's prior convictions for Missouri burglary in the second degree as predicate offenses which, in conjunction with his other prior convictions, subject him to an enhanced sentence under 18 U.S.C. § 924(e).

Accordingly, the judgment of the district court is affirmed.

BRIGHT, Senior Circuit Judge, dissenting.

I dissent.

The majority follows the holding of *United States v. Portwood*, 857 F.2d 1221 (8th Cir.1988). In *Portwood*, the court held that Missouri's second degree burglary statute satisfies the definition of burglary as used by Congress in 18 U.S.C. § 924(e). According to *Portwood*, "the statute says 'burglary,' and we take that to mean 'burglary,' however a state may choose to define it." *Portwood*, 857 F.2d at 1223–24. Neither *Portwood*, nor this case, can be justified on careful examination of the federal statute and its legislative history.

Section 924(e) does not define "burglary." As a matter of statutory construction, "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329, 101 S.Ct. 2789, 2794, 69 L.Ed.2d 672 (1981). *See also Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 249, 96 L.Ed. 288 (1952).

"Burglary" has a common law meaning: "the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." W. LaFave & A. Scott, Jr., *Criminal Law* 792 (2d ed. 1986). Modern statutes setting out offenses denominated as burglary may or may not possess the common law elements of burglary. As such, burglary does not have an established "modern" meaning. Moreover, no language in the enhancement statute dictates a meaning other than the common law meaning. *See United States v. Headspeth*, 852 F.2d 753, 757–58 (4th Cir.1988).

The Eighth Circuit's interpretation of the statute produces an anomalous result, demonstrated by a comparison to *Headspeth*. In *Headspeth*, the court considered the application of section 924(e) to a defendant with two convictions for robbery and a third conviction, there in question, for the crime of "storehouse breaking," under Maryland law. Conduct amounting to storehouse breaking in Maryland (breaking into a storehouse in day or night with intent to commit a felony or theft of property of the value of $300 or more) would be at least second degree burglary in Missouri.[1] *Compare id.* at 756 (quoting Md.Ann.Code art. 27, § 32 (1971)), *with* majority op. at 626–27. *Headspeth* concluded that storehouse breaking did not constitute burglary under the enhancement provision and

1. Taylor was convicted of second degree burglary in 1971. Effective January 1, 1979, the Missouri second degree burglary statute was amended. *See* Mo.Ann.Stat. § 569.170 (Vernon 1979). The majority and the parties cite the present second degree burglary statute. For the purposes of this case, I assume the revision did not make a substantive change in the statute, as it applied to the defendant. *See State v. Eaton*, 504 S.W.2d 12, 15 (Mo.1973).

thus an enhanced penalty did not apply to the defendant.

The majority, however, subjects Taylor to the enhanced penalty because the State labeled his conduct burglary. Following the majority's analysis to its logical conclusion, a traffic offense of wrongful parking, i.e., the taking of someone else's privilege of using a parking space, if labeled burglary by a state, could be used to enhance a sentence under section 924.

I do not believe the application of a federal sentence enhancement provision should turn on the differing labels given to similar conduct by the various states. Such application treats similarly situated persons differently for the purpose of a federally imposed sentence. I find it unlikely Congress would have intended such a result. *Cf.* U.S.Sent.Comm.Sent. Guidelines at 2 (Oct. 1987) (Congress sought *uniformity* in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders.) Unfortunately, neither the majority nor *Portwood* gives consideration to section 924's legislative history. *Headspeth*'s analysis of the legislative history is instructive and dispositive. The opinion by Circuit Judge Phillips of the Fourth Circuit stated:

> The government argues, however, that the legislative history and purpose of the § 924(e) sentence enhancement provision demonstrate that Congress intended the term burglary to have a more expansive definition than obtained at common law. We disagree.
>
> At one point, § 924(e) did indeed contain a definition of burglary which would encompass Maryland's storehouse breaking offense. As originally enacted, § 924(e)'s sentence enhancement provision was triggered only by previous convictions for either "robbery" or "burglary." Section 924(e)(2)(B) then specifically defined "burglary" as "any crime punishable by a term of imprisonment exceeding one year and consisting of entering or remaining surreptitiously within a building that is the property of another with intent to engage in conduct constituting a Federal or State offense." This definition of burglary, which was considerably broader than its common law counterpart, would of course cover storehouse breaking, as that offense is defined in Maryland.
>
> But this broad statutory definition of burglary was extremely short-lived. Two days after § 924(e) was enacted—and several months before it became effective—Congress began to consider expanding the list of predicate offenses that would trigger it. *See* Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 44 (May 21, 1986) [hereinafter Hearing]. At the ensuing hearings, there was a general consensus that the specific predicate offenses of "robbery" and "burglary," together with their respective definitions, should be replaced with the more general terms "serious drug offense" and "violent felony." *See* H.R.Rep. No. 849, 99th Cong., 2d Sess. 3 (1986). There was considerable disagreement, though, about how to define the term "violent felony."
>
> One proposed amendment, introduced by Representative Wyden of Oregon, favored a broad definition which would include crimes against both person and property:
>
> > (A) an offense that has as an element the use, attempted use, or threatened use of physical force against the person *or property* of another; or
> >
> > (B) any felony which, by its nature, involves a substantial risk that physical force against the person *or property* of another may be used in the course of committing the offense.
>
> H.R. 4639, 99th Cong., 2d Sess. (1986) (emphasis added). This proposal drew a flurry of criticism, for the inclusion of property crimes was thought to be an unwarranted extension of federal criminal jurisdiction which would both encroach upon state sovereignty and overload the federal prison system. *See, e.g.*, Hearing at 11 (statement of Rep. Hughes).
>
> A second proposal, introduced by Representatives Hughes and McCollum, would have defined the term "violent felony" much more narrowly as "any State

or Federal felony that has *as an element* the use, attempted use, or threatened use of physical force against the *person* of another." H.R. 4768, 99th Cong., 2d Sess. (1986) (emphasis added). This definition would have excluded burglary as a predicate offense, because the actual or threatened use of force against the person is not an element of that offense, either at common law or under the original § 924(e)(2)(B). *See* Hearing at 26 (statement of Rep. Hughes) (indicating that the exclusion of burglary was deliberate).

The Hughes/McCollum proposal was roundly criticized for its failure to include burglary, arson, and other violent crimes against property which, though they did not have the actual or threatened use of force against the person as an element, nonetheless posed a severe inherent danger to human life. *See, e.g.*, Hearing at 9 (statement of Rep. Wyden); *id.* at 23–24 (statement of James Knapp, Deputy Ass't Attorney General, Crim. Div., U.S. Dept. of Justice).

The amendment that was ultimately passed, and now appears as 18 U.S.C. § 924(e)(2)(B), was a compromise of sorts. It defined the term "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year that—
>
> (i) has *as an element* the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

Pub.L. No. 99–570, 100 Stat. 3207 (1986) (emphasis added). The § 924(e)(2)(B)(ii) catch-all, which permits certain felonies against property to serve as the basis for sentence enhancement, was designed to satisfy the proponents of H.R. 4639, while the limitation of that provision to crimes which present a serious risk of injury to the *person* was a concession to those who favored H.R. 4768.

Though the amended statute lists burglary as a predicate offense, it specifically deletes the broad definition of that term which had appeared in the original version of the statute. This omission, viewed in light of the efforts to remove burglary altogether from the list of predicate offenses, suggests that Congress intended to revert to the narrow common law definition of burglary in the amended statute. The common law definition is, to be sure, more consistent with the amended statute's focus on conduct which poses a serious potential risk of injury to the person. Absent more persuasive evidence that Congress intended the term "burglary" in amended § 924(e)(2)(B) to mean something else, we are reluctant to depart from the usual presumption that Congress intended the term to be given its common law meaning. Accordingly, we hold that the term "burglary," as used in § 924(e)(2)(B)(ii), means the breaking and entering of the dwelling house of another, in the nighttime, with the intent to commit a felony therein. So defined, the term "burglary" does not encompass storehouse breaking, as that offense is defined under Maryland law.

Headspeth, 852 F.2d at 757–58 (footnote omitted).

For these reasons, I would hold that Missouri's second degree burglary is not "burglary" under section 924(e)(2)(B)(ii). Additionally, Missouri's second degree burglary does not fall within the statutory phrase of section 924(e) "or otherwise involves conduct that presents a serious risk of physical injury to another." That issue was also addressed in *Headspeth*.

Nor do we believe, as the government suggests, that the crime of storehouse breaking set forth in Md.Code Ann. art. 27, § 32 is an offense which, in the language of the statute, "otherwise involves conduct that presents a serious potential risk of physical injury to another." As was noted in argument before this court, the catch-all language "otherwise involves conduct that presents a serious potential risk of physical injury to another" is, in context, ambiguous. It could be read to refer, as did H.R. 4639, only to offenses which *by their very nature* pose a risk of injury to another. Since

the specifically enumerated crimes that precede the catch-all language—"burglary," "arson," "extortion," and "use of explosives"—are all offenses which by their very nature obviously pose an inherent risk of injury to the person, this interpretation may be the most plausible. On this view, the offense of storehouse breaking at issue here could not fairly be called a "violent felony" within the meaning of § 924(e)(2)(B)(ii), for by its very nature, storehouse breaking generally involves unoccupied buildings. While particular instances of storehouse breaking may, on occasion, present some risk of injury to a person, the crime itself is not one which, like common law burglary, arson, extortion, and the use of explosives, poses such a risk *by its very nature.*

Headspeth, 852 F.2d at 758–59.

Missouri law, by definition, distinguishes burglaries which are potentially violent and those not showing violence or threats of violence. Burglary in the first degree encompasses entry into a building when armed or when the burglar causes or threatens physical injury to a person not a participant in the crime, or where a person other than a participant is present in the building. Mo.Ann.Stat. § 569.160.1 (Vernon 1979). In contrast, burglary in the second degree, quoted in the majority opinion at 626, may relate to an unarmed burglary of an unoccupied building. *See, e.g., State v. Eaton*, 504 S.W.2d 12 (Mo.1973).

Thus, the conviction for second degree burglary under Missouri law, relating as it does to entry into a structure without an occupant, poses no threat of harm to persons.

The comment in the majority opinion at 627, quoting *Portwood*, 857 F.2d at 1224, that any conduct which may be a burglary under any state law, regardless of the details, "presents the type of potential threat to society that Congress sought to control by the enactment of § 924(e)" does not accord with the legislative history previously quoted in this opinion.

Moreover, it seems perfectly clear that the language of the statutory provision here in question, underlined in the footnote,[2] relates to crimes other than burglary (under common law), arson, or extortion which may present "a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

I add a final comment. Institutionally, a panel of this court must follow the rule of law laid down in a prior panel opinion. Only the en banc court can overrule a published panel opinion. Nevertheless, neither this panel nor this writer need uncritically accept a prior panel opinion which may be flawed. I suggest the rule of this case and *Portwood* in deciding that every burglary defined under state law qualifies as a "violent felony" pursuant to 18 U.S.C. § 924(e)(2)(B)(ii) needs re-examination by this court en banc or by the United States Supreme Court.

Richard B. SANDERS, Plaintiff–Appellant,

v.

John ROBINSON, individually and as Tribal Judge of the Northern Cheyenne Tribal Court, the Northern Cheyenne Tribe, at Lame Deer, Montana, Defendants–Appellees,

and

Laura Lonebear, Defendant–Intervenor–Appellee.

No. 87–4192.

United States Court of Appeals, Ninth Circuit.

Submitted Oct. 6, 1988.

Decided Nov. 30, 1988.

Amended Dec. 8, 1988.

Husband appealed from order of the United States District Court for the Dis-

2. Section 924(e)(2)(B)(ii) reads:

(ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another.* (Emphasis added).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Cause No. S1-87-147CR(2)
vs.	)	St. Louis, Missouri
ARTHUR LAJUANE TAYLOR,	)	March 2, 1988
Defendant.	)	

SENTENCING PROCEEDINGS

BEFORE THE HONORABLE JOHN F. NANGLE

APPEARANCES:

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APPENDIX B

(Wednesday morning, March 2nd, 1988, 10:00 a.m., defendant and counsel present)

THE COURT: United States versus Arthur Taylor.

Mr. Livingston, Mr. Taylor, Mr. Poehling.

Go ahead, Mr. Livingston.

Needless to say a major question concerning this sentencing has been briefed by you, studied by me; right? I mean I represent that to you -- considered by me not only, you know, on recent days but previously. And I do not agree with your assessment of the law. I'm going to tell you it's not all black and white and I don't agree with the law. I mean I don't like the idea despite Mr. Taylor's pretty miserable record. I don't like the idea of giving him this hunk of sentence. To me it's ridiculous. But I'm not Congress.

We can go into greater detail and there may be some things that you wanted to point out to me, but I have studied the statutes -- I have had this problem before -- and I have looked at your brief. And you did a good job. I want to commend you on it. And I trust -- I don't guess I have to say I trust that you will appeal from my decision and see what the Eighth Circuit does in that regard.

But you might -- you know, it's just -- I'm not telling you it's all black and white, there is some shade in there.

Second degree, I don't observe any reference in the law to any degrees in burglary nor in the cases. They don't define

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it. I know that Mr. Taylor had a couple burglary convictions that were burglary second degree as we call that in Missouri.

So that we get the record clear on the offenses, let's make sure that there is -- there is one of the offenses that the probation office or no one could check out. Isn't there one alleged offense in California? Is that right, Mr. Poehling and Mr. Livingston?

MR. POEHLING: There was one offense, Your Honor, that the probation people were unable to verify and that was from the State of California assault to do great bodily harm with force I believe. It occurred in approximately 1965.

THE COURT: I'm trying to remember. But, anyway, the offenses listed in Count -- same ones, of course, in all the counts but the offenses listed therein, let's just go down the line and make sure that as far as the record is concerned Mr. Taylor agrees or doesn't agree with them.

Let's see, this plea was to Count --

MR. POEHLING: Count III I believe, Your Honor.

THE COURT: Count III. So we will work with that one. I guess they are all the same.

And I'm troubled also by the fact that, you know, 1963 offenses. Personally it bothers me but I just don't -- my hands are tied in my judgment. And it's one of the laws Congress enacted, we all know the reasons.

But this included an offense on May 27th, 1963. The

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offenses of two counts of burglary second degree and stealing and burglary second degree. Is that correctly stated in there, Mr. Taylor and Mr. Poehling? Have you had certified copies of those?

MR. POEHLING: Yes, Your Honor. Those occurred in the Circuit Court of the City of St. Louis, yes.

Mr. Livingston has had access to the certified copies.

THE COURT: I think what we ought to do is to make the certified copies part of the record so that an appellate judge should he see them can look and see how they appear.

MR. POEHLING: I have no objection to that and I can furnish them to the Court.

MR. LIVINGSTON: Would it be appropriate to include the police report, the one police report that was available that's attached to my brief?

THE COURT: I don't think so. I think when you brief it, should you do that, you can -- you're going to refer to Mr. Taylor's participation in the acts and development of that?

MR. LIVINGSTON: Right.

THE COURT: I don't have any problem with it. What I would think, if an appellate court should determine that I'm wrong I think they would send it back to me for a hearing in that regard. You know what I'm saying? To develop -- I think they would want me to go into detail. I got enough problems doing my own job without doing theirs. But you might just --

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I think if they want it they will get it. So let's just leave this thing with the certified copies of the offenses and then I'm sure --

Let's see, then October 5th, 1971 is another burglary in the Circuit Court of the City of St. Louis. Is that a correct charge and allegation, Mr. Taylor and Mr. Livingston?

MR. LIVINGSTON: I believe it is.

THE COURT: And June 22nd, '71 is robbery first degree. Is there any question about that one?

THE DEFENDANT: No, sir.

THE COURT: So that we are clear, let me see, burglary second -- well, you claim that actually three of the offenses were burglaries; right? Three of the four?

MR. LIVINGSTON: No, Your Honor. There are five convictions, two of which --

THE COURT: One of them is kind of left out, the California. You say five including California?

MR. LIVINGSTON: That's right.

THE COURT: We don't have the California conviction as a matter of record here; am I correct?

MR. POEHLING: No, that's incorrect. It was not on the indictment but it was filed, the notice of punishment enhancement that the government filed on January 7th of 1988 sets out the ones you just talked about plus --

THE COURT: Do you have certified copies of them?

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MR. POEHLING: Yes.

THE COURT: Okay. That's what I didn't understand. So you do have certified copies and you have seen the certified copies?

MR. LIVINGSTON: Yes, I have seen them.

THE COURT: Let's order that that be made part of the record so we got a full record.

Go ahead, Mr. Livingston.

MR. LIVINGSTON: The only conviction of the five in the government's notice that we are challenging whether or not it actually is the defendant is listed in paragraph 5 of their notice of punishment enhancement. That's -- I believe there's a typo, I think it's December 1, 1965 that the certified copies will show is the date. But at any rate the paragraph 5 conviction Mr. Taylor contends is not him. The probation office of this court researched that and attempted to verify that it was him and could not do so. And we would say it's inappropriate to consider that offense for punishment enhancement.

THE COURT: Mr. Poehling, what is your response to that?

MR. POEHLING: Your Honor, the probation office has attempted to verify that and have not been able to.

THE COURT: Is that right, Ms. Hoosman?

MS. HOOSMAN: Yes, sir.

THE COURT: So there's no verification of the charge in paragraph 5.

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MR. POEHLING: So with respect of the one that is set forth in number 5, Your Honor, I would agree to withdraw that.

THE COURT: That's what I thought. I had eliminated it.

MR. POEHLING: The fourth one which is under point four which is the California conviction for assault with force, that's not disputed as I understand it. Mr. Taylor acknowledges that is him and it's a valid conviction.

THE COURT: Is that right, Mr. Taylor?

THE DEFENDANT: Yes, sir.

THE COURT: So we are down to the charges in the notice of punishment enhancement of the four paragraphs we have eliminated the fifth.

Now, with regard to that, one of them is robbery first; right, Mr. Livingston?

MR. LIVINGSTON: That's correct.

THE COURT: Another is assault with force. That's the California thing; right? You're challenging the October 5th, '71 burglary second?

MR. LIVINGSTON: And the May 27th, 1963 burglary second.

THE COURT: And the '63 burglary second. Okay.

You don't have that in here, Mr. Poehling -- oh, yes you do. Good Lord. Yes, May 27th, '63 is the first one charged in the indictment and it's also the first one set out in the notice of punishment enhancement. Okay. They are both the first

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paragraph and second paragraph of the notice of punishment enhancement referring to burglary second degree, and it's the defendant's position that that's not a viable crime, et cetera, a degree of burglary that was not contemplated by Congress when it enacted 924; is that correct, Mr. Livingston?

MR. LIVINGSTON: That's my position.

THE COURT: Now, separate and apart from that and over and above that is there anything else you want to say to me on this sentencing matter?

MR. LIVINGSTON: Well, I guess if your mind is made up I don't need to waste the Court's time. I do think that my arguments have some validity but we won't go into that.

As far as where you would sentence the defendant, if you recall he was sent to Springfield. A medical report was released and should be in the file indicating substance abuse problem and some other psychological problems and I would appreciate it if the Court would recommend that he at least initially be sent there.

THE COURT: To Springfield?

MR. LIVINGSTON: Yes.

THE COURT: Did you want to add anything, Mr. Taylor? Say anything to me?

MR. TAYLOR: No.

THE COURT: Mr. Poehling?

MR. POEHLING: No, Your Honor.

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THE COURT: With regard to the location of Mr. Taylor's incarceration I'm obliged to leave that up to the United States Prison -- Department of Justice, U. S. Prison Agency. However, if there is any question about his need for at least temporary incarceration or checking out at Springfield, Ms. Hoosman, would you check into that and see if that is suitable? And if it is appropriate, why, then it should be done.

In view of my approach to this I'm not going to make a lot of comments. I think it's -- I do not personally approve of this enactment but I'm faced with it and, as I say, it's not because Mr. Taylor has led such an exemplary life, you skirted around and got yourself into an awful lot of trouble, but that still to me doesn't justify what I have to do here.

So it will be the sentence of this Court on Count III that the defendant be committed to the custody of the Attorney General for imprisonment for a period of fifteen years and he shall not be eligible for probation or parole during that period.

I will order the special assessment of fifty dollars.

Part of this record will include the certified copies of the prior convictions as we indicated in our discussion. And my action is, of course, not based upon the -- a little more definitive here on what I will call the second -- paragraph 5 of the notice of punishment enhancement, California conviction, which has not been supported in the record.

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The other certified copies of convictions will be ordered to be made a part of this record on appeal as well as the defendant's motion to strike notice of punishment enhancement, which I will deny.

Gentlemen, I think that does it.

You may step down.

MR. POEHLING: Your Honor, the government would ask leave of Court to dismiss Counts I and II of the indictment.

THE COURT: So ordered.

Mr. Livingston, you have done a good job and stick with it.

MR. LIVINGSTON: Thank you, Your Honor.

* * * * * * * * * * * * * * * * * *

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

3/21/88
DATE

Richard A. Peterson
OFFICIAL COURT REPORTER

FORM SEL - 711 REPORTERS PAPER & MFG CO 800-626-6313

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

FILED
MAR 29 1989
EYVON MENDENHALL
U. S. DISTRICT COURT
E. DISTRICT OF MO.

JUDGMENT

No. 88-1408EM

United States of America,	*	
	*	
Appellee,	*	
	*	
vs.	*	Appeal from the United States
	*	District Court for the
Arthur Lajuane Taylor,	*	Eastern District of Missouri
	*	
Appellant.	*	
	*	
	*	
	*	

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

January 4, 1989

A true copy.

ATTEST:

Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED 3/20/89

APPENDIX C

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 88-1408-EM

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
vs.	*	District Court for the
	*	Eastern District of Missouri
Arthur Lajuane Taylor,	*	
	*	
Appellant.	*	

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

March 7, 1989

Order Entered at the Direction of the Court:

Clerk, United States Court of Appeals, Eighth Circuit

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	No. S1-87-147 CR(1)
	)	
ARTHUR LAJUANE TAYLOR,	)	
	)	
Defendant.	)	

PLEA AGREEMENT

COMES NOW the parties in the above matter, and pursuant to Rule 11(e)(2), Federal Rules of Criminal Procedure, state and disclose to the Court that the following plea agreement has been entered into between the United States of America by Richard L. Poehling, Assistant United States Attorney for the Eastern District of Missouri, and Arthur LaJuane Taylor, individually and through his attorney, Bruce Livingston.

1. The defendant, Arthur LaJuane Taylor is to enter a knowing and voluntary plea of guilty Count III of the superseding indictment in Cause No. S1-87-147 CR(1), wherein the defendant is charged with possession of a firearm by a convicted felon in violation of Title 18, United States Code ~~Appendix~~, Section 922(g)(1).

APPENDIX E

2. The, defendant acknowledges the Government's intention to seek the application of the punishment enhancement provisions of Title 18, United States Code, Section 924(e)(1). It is agreed by the parties that the defendant is not waiving his right to challenge the applicability of these provisions.

3. At the time of sentencing pursuant to the above plea, the Government agrees to seek leave of court to dismiss Counts I and II of the superseding indictment in this cause.

4. The United States Government agrees not to proceed against Arthur LaJuane Taylor for any other violations of Federal firearms laws which may have occurred within the Eastern District of Missouri during the course of the Government investigation of the defendant prior to the date of this agreement.

5. It is understood between the parties that if the defendant does not comply with the conditions referred to in point 1, as set forth above, that this agreement is null and void, and prosecution may proceed on the superseding indictment, and any other charges to which the defendant, Arthur LaJuane Taylor is subject.

6. The United States Attorney's Office for the Eastern District of Missouri has made no expressed or implied commitment, promise or expressed no opinion on behalf of any other Federal, State or local prosecuting authority.

7. The parties understand and agree that this plea agreement is subject to the approval of the United States District Court, under the provisions of Rule 11(e)(2), Federal Rules of Criminal Procedure.

8. The information set forth above is fully and completely the substance of any agreements made between the parties, and no other understandings or agreements, expressed or implied, have been made between the parties in this case.

9. The defendant, Arthur LaJuane Taylor, acknowledges that this agreement has been read to him in its entirety; that he understands its provisions, and has had any questions answered to his satisfaction; that he has been given the opportunity to consult fully and completely with his attorney before executing this agreement; that this agreement is not the result of any threats or promises of

the Office of the United States Attorney or of any other Government agent or office, other than that set forth above.

RICHARD L. POEHLING
Asst. United States Attorney
Eastern District of Missouri

ARTHUR LAJUANE TAYLOR
Defendant

BRUCE LIVINGSTON
Attorney for Defendant

88-7194

AFFIDAVIT OF SERVICE

I, Bruce Dayton Livingston, being duly sworn under oath declare that the originals of the foregoing motion to proceed *in forma pauperis* and the attached petition for writ of certiorari with its accompanying appendixes were served by depositing them in a United States mail box with first class postage prepaid, addressed to Joseph F. Spaniol, Clerk, Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543; and that at the same time copies were placed in the same mail box postage prepaid and addressed to David Rosen, Assistant United States Attorney for the Eastern District of Missouri, 1114 Market Street, St. Louis, Missouri 63101; and the Solicitor General, Department of Justice, Washington, D.C. 20530. Affiant swears that this motion and the accompanying petition for writ of certiorari by petitioner Taylor was deposited by affiant in the mailbox located at the corner of Broadway and Pine Street in the City of St. Louis, Missouri on May 6, 1989, within 60 days following the Eighth Circuit United States Court of Appeals denial of defendant Taylor's petition for rehearing en banc.

Bruce Dayton Livingston

Bruce Dayton Livingston

SUBSCRIBED AND SWORN TO before me this 6th day of May, 1989.

Notary Public

My Commission Expires:

KENNETH J. BARNHOUSE
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES JANUARY
CITY OF ST. LOUIS

ORIGINAL

No. 88-7194

Supreme Court, U.S.
FILED
JUN 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ARTHUR LAJUANE TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

ANDREW LEVCHUK
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the offense of second degree burglary under Missouri law is a "violent felony" under the sentence enhancement provision of 18 U.S.C. 924(e)(1) and 924(e)(2)(B)(ii) (Supp. V 1987).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 88-7194

ARTHUR LAJUANE TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 864 F.2d 625.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1989. A petition for rehearing was denied on March 7, 1989 (Pet. App. 18a). The petition for a writ of certiorari was filed on March 31, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was indicted in the Eastern District of Missouri on three counts of possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. 922(g)(1) (Supp. V 1987). In the district court, the government filed a pretrial "Notice of Punishment Enhancement" that notified petitioner that since his criminal record included two previous

convictions for second degree burglary under Missouri state law,[1] one previous state conviction for robbery, and two previous state convictions for assault, he was subject to the enhanced sentence of 15 years' imprisonment under 18 U.S.C. 924(e)(1) (Supp. V 1987) (Pet. C.A. Br. Add. A2, at 1-3).[2]

Petitioner was convicted on a plea of guilty to one of the three counts in the indictment.[3] At the sentencing hearing, petitioner contended that his burglary convictions were not proper predicate offenses under Section 924(e)(1) because those crimes did not involve actual or potential injury to others.[4]

---

[1] Missouri state law defines second degree burglary as "knowingly enter[ing] unlawfully or knowingly remain[ing] unlawfully in a building or inhabitable structure for the purpose of committing a crime therein" (Mo. Rev. Stat. § 569.170 (1979)).

[2] The sentence enhancement provision of 18 U.S.C. 924(e)(1) applies to previously convicted felons who possess or receive a firearm in violation of 18 U.S.C. 922(g). Title 18, United States Code, Section 924(e)(1), provides in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years * * *.

Title 18, United States Code, Section 922(g)(1), refers to any "convict[ion] in any court of a crime punishable by imprisonment for a term exceeding one year."

Title 18, United States Code, Section 924(e)(2)(B), provides:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

[3] Under the plea agreement between petitioner and the government, petitioner agreed to plead guilty to one count of possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. 922(g)(1). The government agreed to move to dismiss the remaining two counts at the time of sentencing. Pet. App. 19a-22a.

[4] At the sentencing hearing, the government agreed with petitioner that the district court should not consider one of the two state assault convictions in applying the enhancement provision since that conviction had not been verified. Pet. App. 12a-13a. Petitioner also conceded that his remaining state assault conviction and his robbery conviction each qualified as a "violent felony" under the sentence enhancement provision of 18 U.S.C. 924(e)(1) and 924(e)(2)(B)(ii). Pet. App. 13a; Pet. C.A. Br. 5; Pet. Mot. to Strike Notice of Punishment Enhancement 1-2; Pet. Mem. in Supp. of Mot. to Strike Notice of Punishment Enhancement 1-2.

Pet. App. 13a-14a; Pet. Mem. in Supp. of Mot. to Strike Notice of Punishment Enhancement 2-4, 5-13. The district court rejected that argument and sentenced petitioner to an enhanced term of 15 years' imprisonment under Section 924(e)(1). Pet. App. 7a-16a.

2. The court of appeals affirmed. Pet. App. 1a-6a. In the court of appeals, petitioner argued (Pet. C.A. Br. 7-13; Pet. C.A. Reply Br. 1-10) that Section 924(e) did not apply to his state burglary convictions because those offenses did not involve a serious potential risk of physical injury to another. Relying on its recent decision in United States v. Portwood, 857 F.2d 1221 (8th Cir. 1988), cert. denied, 109 S. Ct. 2073 (1989), the court of appeals reiterated that Congress's use of the term "burglary" in Section 924(e)(2)(B)(ii) means "burglary however a state chooses to define it" (Pet. App. 3a (internal quotation marks omitted)). As the court explained, "'[a] person with * * * prior convictions for burglary, regardless of the details of each burglary, presents the type of potential threat to society that Congress sought to control by the enactment of § 924(e)'" (ibid. (quoting Portwood, 857 F.2d at 1224)). Consequently, the court held, "'Congress could quite reasonably conclude that no matter what the felon's intent upon breaking in, the property owner may return, a neighbor may investigate, or a law enforcement official may respond,'" all of which "'scenarios present a grave threat of harm to persons'" (ibid. (quoting Portwood, 857 F.2d at 1224)).

Judge Bright dissented (Pet. App. 3a-6a). In his view, since Congress did not define the term "burglary" in Section 924(e), Congress must have intended to use the common law definition, i.e., "the breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony" (Pet. App. 3a (internal quotation marks and citation omitted)). Since Judge Bright found that petitioner's state burglary

convictions do not fall within this common law definition and do not otherwise "involve[] conduct that presents a serious potential risk of physical injury to another" (18 U.S.C. 924(e)(2)(B)(ii)), he concluded that petitioner should not have been subjected to the enhancement provision of Section 924(e). Pet. App. 5a-6a.

ARGUMENT

In this Court, petitioner for the first time contends (Pet. 15-18) that only those burglaries that satisfy the common law definition of burglary qualify as "violent felon[ies]" under the sentence enhancement provision of 18 U.S.C. 924(e)(1) and 924(e)(2)(B)(ii) (Supp. V 1987).[5] Petitioner further contends (Pet. 10-15) that the courts of appeals have divided over the proper definition of the term "burglary" in Section 924(e)(2)(B)(ii), and that the decision below conflicts directly with recent decisions of the Fourth and Ninth Circuits. As we show below, the statutory reference to "burglary" is not limited to the common law definition of burglary. To the contrary, as the legislative history makes clear, Congress intended to retain the generic definition of burglary that was contained in the predecessor statute, the Armed Career Criminal Act of 1984, a definition that reflects the common view among the federal government and the States today, i.e., that burglary consists of the unlawful entering of a building or residence belonging to another for the purpose of committing a federal or state offense.

Accordingly, although we disagree with the reasoning of the court of appeals, petitioner's two state burglary convictions do qualify as "violent felon[ies]" under Section 924(e). Petitioner was therefore properly subjected to the sentence enhancement provision. Furthermore, although petitioner correctly points out that the courts of appeals have adopted different constructions

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[5] In the lower courts, petitioner consistently maintained that his burglary convictions were not proper predicate offenses under Section 924(e)(1) because those crimes did not involve actual or potential injury to others. See Pet. App. 13a-14a; Pet. Mem. in Supp. of Mot. to Strike Notice of Punishment Enhancement 2-4, 5-13; Pet. C.A. Br. 7-13; Pet. C.A. Reply Br. 1-10; Pet. for Rehearing 3 n.2, 4-6.

of Section 924(e), we do not think that this is the appropriate case in which to resolve the conflict since petitioner failed to press in the lower courts the issue that has actually divided the circuits -- whether burglary under Section 924(e) is limited to its common law definition.

1. Petitioner contends (Pet. 15-18) that only those burglaries that satisfy the common law definition of burglary qualify as "violent felon[ies]" under the sentence enhancement provision of 18 U.S.C. 924(e)(1) and 924(e)(2)(B)(ii).[6] As most courts of appeals have concluded, however, the statutory reference to "burglary" is not limited to the common law definition of burglary.[7]

a. The predecessor to Section 924(e), 18 U.S.C. App. 1202 (1982 & Supp. II 1984), was enacted as part of the Armed Career Criminal Act of 1984.[8] Under that provision, anyone in possession of a firearm who had "three previous convictions * * * for robbery or burglary, or both" would be "imprisoned [for] not less than fifteen years * * *." Congress enacted the Armed Career Criminal Act in order to provide more stringent punishment for recidivists. As Senator Specter, the sponsor of the Act, explained:

> The key to the Armed Career Criminal Act is the revelation that a surprisingly small number of criminals commit the vast majority of crimes. Studies reveal that six percent of the criminals arrested commit as much as 70% of the serious crime in this country. The statistic is startling, but the

---

[6] At common law, the offense of burglary consisted of "the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." 2 W. LaFave & A. Scott, Substantive Criminal Law § 8.13, at 464 (1986).

[7] See, e.g., United States v. Dombrowski, No. 88-2545 (7th Cir. June 7, 1989), slip op. 9-20; United States v. Palmer, 871 F.2d 1202, 1204-1209 (3d Cir. 1989); United States v. Leonard, 868 F.2d 1393, 1395-1399 (5th Cir. 1989), cert. pending, No. 88-1895; United States v. Hill, 863 F.2d 1575, 1577-1582 (11th Cir. 1989); United States v. Portwood, 857 F.2d 1221, 1223-1224 (8th Cir. 1988), cert. denied, 109 S. Ct. 2073 (1989); but see United States v. Chatman, 869 F.2d 525, 527-530 (9th Cir. 1989) (adopting common law definition of burglary); United States v. Headspeth, 852 F.2d 753, 756-758 (4th Cir. 1988) (same).

[8] Pub. L. No. 98-473, §§ 1801-1803, 98 Stat. 2185. The Armed Career Criminal Act was itself enacted as a part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976.

> implication is evident: by targeting our resources on this six percent we can dramatically reduce crime. This is what the * * * Act is all about * * *.

Armed Career Criminal Act: Hearings on H.R. 1627 and S. 52 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 17 (1984).

The statute further defined "burglary" in broad generic terms as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense" (18 U.S.C. App. 1202(c)(9) (Supp. II 1984)).[9] Senator Specter explained the inclusion of burglary as a predicate offense:

> Robberies and burglaries are the most damaging crimes to society. Robberies and burglaries occur with far greater frequency than other violent felonies, affect many more people, and cause the greatest losses. * * * Burglaries involve invasion of [innocent individuals'] homes or workplaces, violations of their privacy, and loss of their most personal and valued possessions. * * * Most robberies and burglaries are committed by career criminals * * * [who] often have no lawful employment; their fulltime occupation is crime for profit and many commit crimes on a daily basis. * * * Various studies also indicate that for every time a career criminal is arrested for robbery or burglary, he has probably committed 10 to 20 such crimes. Career criminals commit robberies and burglaries interchangeably.

H.R. Rep. No. 1073, 98th Cong., 2d Sess. 3 (1984) (citation omitted). By its terms, therefore, the broad statutory definition did not restrict "burglary" offenses to an archaic common law definition.[10]

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[9] Section 1202(c)(2), in turn, defined "felony" as "any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less * * *."

[10] The Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, §§ 102, 104, 100 Stat. 451-453, 456-459 (1986), recodified 18 U.S.C. App. 1202 (1982 & Supp. II 1984), with only one minor change, as 18 U.S.C. 924(e) (Supp. IV 1986). See United States v. Headspeth, 852 F.2d at 757 n.1. Congress retained the generic definition of burglary as consisting of entering and remaining surreptitiously within a building of another to engage in conduct constituting a federal or state offense. But unlike the predecessor statute, see note 9, supra, the new provision did not distinguish from felony burglary those state misdemeanor burglary offenses punishable by a prison term of two years or less.

b. Enacted as part of the Anti-Drug Abuse Act of 1986, the "Career Criminal Amendments Act of 1986," Pub. L. No. 99-570, §§ 1401-1402, 100 Stat. 3207-39 to 3207-40 (1986), amended Section 924(e) by including additional predicate acts, such as certain "serious drug offenses." In enlarging the category of predicate acts, the 1986 Act also eliminated Section 924(e)'s definition of "burglary." All the evidence indicates, however, that Congress intended to retain the broad definition of burglary that existed before the latest amendment to the statute.

The Career Criminal Amendments Act of 1986 evolved out of three separate bills, two of which originated in the House of Representatives and one of which arose in the Senate. The Senate bill, S. 2312, 99th Cong., 2d Sess. (1986), and its companion bill in the House, H.R. 4639, 99th Cong., 2d Sess. (1986), defined a "crime of violence" as

> (A) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or
>
> (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The Armed Career Criminal Act Amendments: Hearing on S. 2312 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 3 (1986) (reporting text of S. 2312) [hereinafter Senate Hearing]; Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 4 (1986) (reporting text of H.R. 4639) [hereinafter House Hearing].

Senator Specter, who introduced S. 2312, understood that the bill would "broaden th[e] definition [of career criminal] so that we may have a greater sweep and more effective use of this important statute" (House Hearing 44). On the Senate floor, Senator Specter stated that his bill would "broaden the so-called predicate crimes to include drug violations and certain other serious violent acts. This amendment would change the law by broadening the prior convictions which lead to the

classifications of being a 'career criminal.'" 132 Cong. Rec. 7697 (1986).[11]

The Senate hearings on Senator Specter's bill reveal a shared understanding that the bill would expand the scope of the Armed Career Criminal Act. No mention was made of adopting the more restrictive common law definition of burglary. Representative Wyden, the sponsor of the companion House bill, H.R. 4639, for example, explained that the Act, although successful to date, "would be much more effective if the predicate offenses were extended beyond robbery and burglary to include crimes of violence and serious drug offenses. That's precisely what the bill we recently introduced would do." Senate Hearing 6 (emphasis added); see House Hearing 10. And Deputy Assistant Attorney General Knapp observed that the Senate bill would "expand the coverage of the act" while retaining robbery and burglary as predicate offenses. Senate Hearing 9. "The term 'crime of violence' would include robberies and burglaries," he noted, "since both are felonies that by their nature involve a substantial risk that physical force against the person or property of another may be used in the course of committing them." Ibid.

In addition to H.R. 4639, the House considered H.R. 4768, a similar bill sponsored by Representatives Hughes and McCollum that also expanded the predicate offenses for the Armed Career Criminal Act. Like H.R. 4639, the Hughes/McCollum bill expanded the predicate crimes by introducing the two broad categories of "violent felony or a serious drug offense." That bill defined "violent felony" as "any State or Federal felony that has as an element the use, attempted use, or threatened use of physical force against the person of another." House Hearing 6. On its

---

[11] Senator Specter also entered into the Congressional Record a letter from the Department of Justice, expressing the Department's understanding that the proposed amendment would expand the coverage of the Armed Career Criminal Act beyond (but still including) robbery and burglary. See Letter from Assistant Attorney General John R. Bolton to Senator Arlen Specter (Mar. 18, 1986), quoted in 132 Cong. Rec. 7698 (1986).

face, this bill appeared to focus on the actual use of force against the person of another. The House hearings, however, show that the bill's sponsors understood that its purpose, like that of the Senate bill and its House companion, was "to expand [the Armed Career Criminal Act], which now covers burglary and robbery, to include other serious violent crimes." House Hearing 7 (remarks of Rep. McCollum).

Deputy Assistant Attorney General Knapp also testified at the House hearings and reiterated the Justice Department's view that "one of the critical standard categories involve[s] people with a long history of burglary convictions, because in fact your typical career criminal is most likely to be a burglar * * *. That is probably the No. 1 professional crime." House Hearing 26. He also commented that

> even though injury is not an element of [burglary], it is a potentially very dangerous offense, because when you take your very typical residential burglary or even your professional commercial burglary, there is a very serious danger to people who might be inadvertently found on the premises. Many crimes of violence do occur in the course of committing a burglary. It is something which is clearly a foreseeable risk, and for that reason is always included in any typical felony murder statute.

House Hearing 26.

Deputy Assistant Attorney General Knapp and others expressed concern that H.R. 4768, as drafted, did not necessarily include property crimes such as burglary in its definition of "violent felony," since that definition limited "violent felony" to offenses involving "use of physical force against the person of another" (H.R. 4768, 99th Cong., 2d Sess. (1986), quoted at Housing Hearing 6); see House Hearing 15. But Representative Hughes, the Chairman of the House Subcommittee on Crime, responded to those concerns at the conclusion of the hearings:

> Frankly, I think on the question of burglaries, I can see the arguments both ways. We have already included. burglaries.
>
> My leanings would be to leave it alone; it is in the existing law; it was the existing statute. We can still be specific enough. We are talking about burglaries that probably are being carried out by an armed criminal, because the triggering mechanism is that they possess a weapon. That triggers Federal jurisdiction to begin with. So we are not talking

> about the average run-of-the-mill burglar necessarily, we are talking about somebody who also illegally possesses or has been transferred a firearm.

House Hearing 41. The other members of the Subcommittee concurred in this view, and agreed to "develop some language to do that" (ibid.).

As a result of the hearings, the House Subcommittee on Crime ultimately reported out a clean bill, H.R. 4885, 99th Cong., 2d Sess. (1986). See H.R. Rep. No. 849, 99th Cong., 2d Sess. 6-7 (1986). H.R. 4885 provided in relevant part:

> (B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) involves conduct that presents a serious potential risk of physical injury to another.

H.R. Rep. No. 849, supra, at 7. Subsection (B)(ii) presumably is the language the House Subcommittee "develop[ed]" to cover burglary as it was defined in "the existing statute" (House Hearing 41).

The report of the House Judiciary Committee accompanying H.R. 4885 confirms this point. Indeed, that report makes clear that the bill's principal purpose was to expand the reach of the Armed Career Criminal Act; the report clearly contemplated that the proposed amendments would continue to cover those burglaries included within the ambit of the predecessor statute. As the House Judiciary Committee explained:

> The Subcommittee on Crime held a hearing on May 21, 1986 to consider whether it should expand the predicate offenses (robbery and burglary) in existing law in order to add to its effectiveness. At this hearing a consensus developed in support of an expansion of the predicate offenses to include serious drug trafficking offenses under both State and Federal law and violent felonies, generally. This concept was encompassed in H.R. 4885 by deleting the specific predicate offenses for robbery and burglary and adding as predicate offenses State and Federal laws for which a maximum term of imprisonment of 10 years or more is prescribed for [certain drug offenses] and violent felonies under Federal or State law if the offense has [as] an element the use, attempted use or threatened use of physical force against a [person]. * * *
>
> The other major question involved in these hearings was as to what violent felonies involving physical force against [property] should be included in the definition of "violent" felony. The Subcommittee agreed to add the crimes punishable for a term exceeding one year that involve conduct that presents a serious potential risk of physical injury to others. This will add State and Federal crimes against property such as burglary, arson, extortion, use of explosives and similar crimes as predicate offenses where the conduct involved presents a serious risk of injury to a person.

H.R. Rep. No. 849, supra, at 3 (emphases added).

c. In sum, Congress intended that burglary, as defined under the predecessor Armed Career Criminal Act, would continue to serve as a predicate offense. And to eliminate any confusion in this regard, Congress inserted the term "burglary" into the definition of "violent felony" before passing the Anti-Drug Abuse Act of 1986. See Section 924(e)(2)(B)(ii); 132 Cong. Record H9495 (daily ed. Oct. 8, 1986).

Contrary to petitioner's contention (Pet. 15-18), the legislative history, as detailed above, does not suggest that Congress restricted the definition of "burglary" to its common law definition. Instead, it makes clear that "Congress intended that any burglary that would have met the definition of burglary under the previous act would fall within the meaning of burglary" under the amended statute. United States v. Hill, 863 F.2d 1575, 1582 (11th Cir. 1989).

Here, petitioner's state burglary convictions qualify as predicate offenses under Section 924(e), since those crimes necessarily involved entering or remaining surreptitiously within a building of another with the intent to commit a federal or state offense. See Mo. Rev. Stat. § 569.170 (1979); note 1, supra. Accordingly, petitioner was properly sentenced under the enhancement provision of 18 U.S.C. 924(e)(1) and 924(e)(2)(B)(ii).

2. Petitioner correctly points out (Pet. 10-15) that the courts of appeals have adopted different constructions of Section 924(e). The actual conflict, however, does not concern the issue petitioner pressed before the district court and the court of appeals, namely, whether Section 924(e) applies only to burglaries that pose a potential risk of physical injury.

Rather, the courts have disagreed over the separate issue whether the statute includes only those burglaries that would be treated as such under common law, i.e., the "breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." 2 W. LaFave & A. Scott, Substantive Criminal Law, § 8.13, at 464 (1986).

a. To date, three courts of appeals have agreed with our position that Congress fully intended to retain in the Career Criminal Amendments Act of 1986 the broad definition of burglary that was contained in the original version of Section 924(e). In so concluding, those courts have rejected the view that the statutory reference to "burglary" is limited to the common law definition of that crime. United States v. Dombrowski, No. 88-2545 (7th Cir. June 7, 1989), slip op. 19-20; United States v. Palmer, 871 F.2d 1202, 1204-1209 (3d Cir. 1989); United States v. Hill, 863 F.2d at 1582. Thus, after surveying the legislative history detailed above, the Eleventh Circuit correctly noted that "the purpose of the 1986 amendments to section 924(e) was to expand the predicate offenses, not restrict them." United States v. Hill, 863 F.2d at 1581; see United States v. Palmer, 871 F.2d at 1208. Those three circuits have consequently held that "the term 'burglary' must be given the generic definition that explicitly existed prior to its amendment." United States v. Palmer, 871 F.2d at 1208; accord United States v. Dombrowski, slip op. 19-20 ("we think [Congress's] intent was to carry forward the prior definition -- even if not explicitly stated"); United States v. Hill, 863 F.2d at 1582.[12]

---

[12] As the Eleventh Circuit correctly noted, "even if the legislative history were not as clear as we believe it to be, [the court] would be reluctant to conclude that Congress intended to use a definition of burglary that has become an anachronism." United States v. Hill, 863 F.2d at 1582. When a common law term has evolved beyond its common law meaning, courts should apply the "ordinary, contemporary, common meaning," and not the antiquated notions of early common law. Perrin v. United States, 444 U.S. 37, 42 (1979) (bribery under Travel Act, 18 U.S.C. 1952, not confined to common law definition). Thus, in concluding that the offense proscribed in 18 U.S.C. 2113(b) is not limited to common law larceny, the Court stated:

> We cannot believe that Congress wished to limit the scope of the [statute's] coverage, and thus limit its remedial purpose, on the basis of an arcane and artificial distinction more suited to the social conditions of 18th-century England than the needs of 20th-century America.

Bell v. United States, 462 U.S. 356, 362 (1983); see also Burns v. Alcala, 420 U.S. 575, 580-581 (1975).

Missouri and the vast majority of other States have long since abandoned the strict common law definition in their burglary statutes. See United States v. Hill, 863 F.2d at 1582 n.5 (noting that only five of 36 States surveyed retained common law definition of burglary). The Model Penal Code reflects this development, defining burglary as follows:

> A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.

Model Penal Code § 221.1 (Proposed Official Draft 1962). Indeed, as one commentator has noted, "[o]f all common law crimes, burglary today perhaps least resembles the prototype from which it sprang." Note, Statutory Burglary -- The Magic of Four Walls and a Roof, 100 U. Pa. L. Rev. 411 (1951). Moreover, specific statutes creating federal crimes of burglary, such as 18 U.S.C. 2113(b) and 18 U.S.C. 2118(b) (Supp. V 1987), do not restrict the offense to its common law boundaries. Accordingly, it defies both logic and common sense to attribute to Congress an intent to adopt a common law concept that has been rejected by virtually every State and by Congress in Title 18 as well.

b. Joining the Third, Seventh, and Eleventh Circuits, the court of appeals here concluded that the statutory reference to "burglary" is not limited to the common law definition of burglary (Pet. App. 2a-3a (citing United States v. Portwood, 857 F.2d at 1223-1224)). But in rejecting the strict common law definition, the Eighth Circuit appears to have articulated a different construction of Section 924(e). It has concluded that the statute applies to any felony defined as "burglary" under state law. See Pet. App. 3a; United States v. Leonard, 868 F.2d 1393, 1398 (5th Cir. 1989) ("a conviction for a crime which the state denominates 'burglary' is a conviction within the meaning of § 924(e)(2)(B)(ii)"), cert. pending, No. 88-1885. To the extent the Fifth and Eighth Circuits expand the definition of Section 924(e) beyond that contained in the predecessor statute and suggest that the previous federal definition of burglary contained in the Firearms Owners' Protection Act and the Armed Career Criminal Act of 1984 does not control, we disagree for the

reasons stated above (see pp. 5-11, supra). Nevertheless, it is clear that petitioner's burglary convictions qualify as predicate crimes under the rationale espoused by the Fifth and Eighth Circuits.

In addition, neither the Eighth Circuit here nor the Fifth Circuit has expressly rejected the position that Section 924(e) incorporates its predecessors' definition of burglary. Indeed, the state burglary statutes actually followed in these cases are entirely consistent with the federal definition of burglary contained in the Armed Career Criminal Act and the Firearms Owners' Protection Act (see p. 6 & nn.9-10, supra). See Pet. App. 3a (burglaries of "building or inhabitable structure," Mo. Rev. Stat. § 569.170 (1979)); United States v. Leonard, 868 F.2d at 1395 & n.2 (burglaries of "habitation" and "building," Tex. Penal Code Ann. § 30.02 (Vernon 1974)). For those reasons, as well as for the reason that petitioner does not even raise the issue, this case is not a suitable vehicle for resolving that apparent inconsistency among the courts of appeals.[13]

c. On the other hand, the Fourth and Ninth Circuits have concluded that Section 924(e) includes only those burglaries that meet the strict common law definition. United States v. Chatman, 869 F.2d 525 (9th Cir. 1989); United States v. Headspeth, 852 F.2d 753 (4th Cir. 1988). In our view, those decisions have misconstrued Congress's intent when it reinserted the predicate offense of "burglary" in Section 924(e).

---

[13] In United States v. Patterson, No. 88-1497 (Apr. 26, 1989), vacated on other grounds (1st Cir. May 17, 1989), the First Circuit declined to apply the former generic definition of burglary to determine whether two breaking and entering convictions under Massachusetts state law qualified as "violent felon[ies]" under Section 924(e). The court of appeals stated that "[w]e frankly cannot divine how Congress intended to define burglary," but then added that "[t]he deliberate omission of the 1984 definition effectively nullifies the intent of Congress, exposed in the legislative history, to define burglary in broad generic terms" (slip op. 12). For the reasons set forth above (see pp. 5-11, supra), we disagree with the First Circuit's analysis of Section 924(e). Nevertheless, in Patterson the First Circuit ultimately held that the Massachusetts breaking and entering convictions fell within Section 924(e)(2)(B)(ii)'s catch-all phrase defining violent felony as any "conduct that presents a serious potential risk of physical injury to another." See slip op. 12-13.

Both the Ninth and the Fourth Circuits have misread the pertinent legislative history, placing determinative weight on the fact that one of the House bills, H.R. 4768, limited the definition of "violent felony" to crimes involving "the use, attempted use, or threatened use of physical force against the person of another." See United States v. Chatman, 869 F.2d at 527-528; United States v. Headspeth, 852 F.2d at 757-758. But both courts of appeals have ignored the fact that the sponsor of H.R. 4768 determined at the conclusion of the hearings that "burglary," as previously defined, should be retained as a predicate offense. Indeed, the members of the Subcommittee on Crime specifically agreed to "develop some language" to do so (House Hearing 41), an express determination noted in the House Judiciary Committee's report on the final House bill, H.R. 4885. See H.R. Rep. No. 849, supra, at 2-3, 5; United States v. Dombrowski, slip op. 17.

3. As petitioner correctly points out (Pet. 13-15), the court of appeals' decision, together with the other circuits' decisions described above, squarely conflict with the construction of Section 924(e) adopted by both the Fourth and Ninth Circuits. Nevertheless, this case is not an appropriate vehicle for the Court to resolve the issue on which the lower courts are divided.

Petitioner did not base his argument in the court of appeals on the issue that has divided the circuits. Petitioner did not argue that his burglary convictions should not be counted against him because those crimes do not fall within the common law definition of "burglary." Instead, in both the district court and the court of appeals, petitioner argued that Section 924(e) applies only to burglaries that pose a potential risk of physical injury. See Pet. App. 13a-14a; Pet. Mem. in Supp. of Mot. to Strike Notice of Punishment Enhancement 2-4, 5-13; Pet. C.A. Br. 7-13; Pet. C.A. Reply Br. 1-10. But no court of appeals has agreed with that reading of the statute. And although petitioner cited below the Fourth Circuit's decision in

Headspeth, he in fact specifically disavowed that court's view that Section 924(e) applies only to those buglaries that fit the common law definition. See Pet. C.A. Reply Br. 4; see also Pet. for Rehearing 5.[14] As a result, petitioner failed to press below the only issue under Section 924(e) on which the courts of appeals are divided.[15]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

ANDREW LEVCHUK
Attorney

JULY 1989

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[14] To be sure, petitioner did suggest before the court of appeals that his convictions for second degree burglary under Missouri state law would not have been treated as burglaries under common law. Pet. C.A. Br. 5 n.3. Petitioner made clear, however, that this statement was part of his argument that under Section 924(e), the burglary offense must involve a potential risk of physical injury to a person. See Pet. C.A. Br. 7-13; Pet. C.A. Reply Br. 4-9.

[15] Carter v. United States, No. 88-7307, squarely raises the issue that has divided the lower courts, i.e., whether Section 924(e) includes only those burglaries that would be treated as such under common law. Since that case is an appropriate vehicle to resolve the conflict, the United States has agreed with petitioner in Carter that the Court should grant certiorari.

SLB PAGE 28

ORIGINAL (4)

No. 88-7194

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ARTHUR LAJUANE TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITIONER'S REPLY TO SOLICITOR GENERAL'S BRIEF IN OPPOSITION

Based on an overly narrow framing of the issue, the Solicitor General opposed Arthur Lajuane Taylor's petition for a writ of certiorari and recommended Carter v. United States, petition for cert. filed, No. 88-7307 (U.S. May 22, 1989), as the "appropriate vehicle" for resolving the conflict in the circuits over the meaning of the word "burglary" in the definition of "violent felony" in 18 U.S.C. § 924(e)(2)(B).[1] Brief for the United States in Opposition at 16 & n.15, Taylor v. United States, petition for cert. filed, No. 88-7194 (U.S. May 10, 1989)(hereinafter "Opposition Brief"). The Solicitor General alleges that the issue dividing the circuits is whether "burglary" under

[1]The pertinent statutory provision provides:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year that -
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) Is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B).

6 pp

section 924(e)(2)(B)(ii) is limited to its common law definition. Opposition Brief at 5, 12, & n.15. The issue, however, is not whether "burglary" has any one particular definition as used in section 924(e). The issue is which definition of "burglary" is correct, if any, of the varying definitions ascribed to the word by the circuits interpreting the definition of "violent felony." See Petition for Certiorari at 11-15, Taylor v. United States, petition for cert. filed, No. 88-7194 (U.S. May 10, 1989) (hereinafter "Petition"); Opposition Brief at 11-16 & n.13; United States v. Patterson, No. 88-1497, slip op. at 19-20 (1st Cir. Aug. 23, 1989) ("burglary" not given "broad generic definition" from predecessor statute [as advocated by the Solicitor General], nor "its common law definition").

Notwithstanding the Solicitor General's more narrow characterization of the issue, petitioner has consistently raised the issue that has divided the circuits: whether "burglary" (under various state law definitions) is a "violent felony" under 18 U.S.C. § 924(e)(2)(B). Opposition Brief at 2, 3, 4 (citing petitioner's conduct in the district court, court of appeals and this Court). See Petition Appendix at 13a-14a; Pet. C.A. Br. at 7-13; Pet. C.A. Reply Br. at 1-10; Petition at 5, 9, 10-15. The government correctly states petitioner's position that his burglaries did not involve actual or potential injury to others and therefore are not "violent felonies" within the meaning of the statute. Opposition Brief at 4 & n.5, 11, 15. As the Solicitor General so aptly noted in his formulation of the "question presented" in this case, the issue is whether the offense of second degree burglary under Missouri law is a "violent felony" under the sentence enhancement provision of 18 U.S.C. § 924(e)(2)(B). See also Petition at ii (asserting in the question presented two other reasons, in addition to the common

law definition presumption, for why petitioner's burglary convictions were not "violent felon[ies]").

The Solicitor General's unduly narrow framing of the issue would address only whether "burglary" as used in section 924(e)(2)(B)(ii) is limited to its common law meaning. Accordingly, the government recommends granting certiorari in Carter, a case with a very limited record and holding and no appellate opinion, while it opposes certiorari in this case. Accepting the Solicitor General's recommendation would be a mistake.

The issue as framed by the Solicitor General in Carter would offer little guidance to the lower courts if it were addressed by this Court and would fail to resolve satisfactorily the broader, more important issue that divides the circuits, the question of which burglary convictions are "violent felon[ies]". If the Fourth and Ninth Circuits have erroneously concluded that "burglary" within the meaning of section 924(e) is restricted to its common law definition, as the Solicitor General contends, little will be gained by granting certiorari in Carter: all that would could be resolved would be that "burglary," as it is used in section 924(e), would not be restricted to "common law" burglary. This Court would still be deluged with cases raising the broader issue of what crimes labeled "burglary", if any, are not "violent felon[ies]" within the meaning of section 924(e). The issue raised by the Solicitor General is subsumed within the broader issue raised by petitioner herein and previously before the Court of Appeals.

This Court should grant a writ of certiorari in the case at bar because petitioner's case would provide the opportunity to offer more guidance and to resolve more completely the conflicts among the circuits. This Court can still determine whether common law "burglary" is the definition of burglary that Congress intended when it drafted section 924(e)(2)(B), the statute (the

issue which the Solicitor General contends would more appropriately be resolved by granting the petition in Carter). But in addition, this case offers much more in the way of guidance to the lower courts.

If certiorari were granted in Taylor, this Court could also address first, whether a definition under federal law was intended by Congress, and second, whether the courts could look beyond the fact of a conviction to the conduct itself, as opposed to determining whether a crime is "inherently violent" based only upon its elements. See United States v. Sherbondy, 865 F.2d 996, 1004-1010 (9th Cir. 1988).

Third, this Court could also determine whether seemingly nonviolent, unarmed burglaries of unoccupied structures could possibly fall into the catch-all provision of § 924(e)(2)(B)(ii) as "conduct that presents a serious potential risk of physical injury to another." See United States v. Patterson, No. 88-1497 (1st Cir. Aug. 23, 1989), slip op. at 17-30 (refusing to apply either the restrictive common law definition [accepted by the Fourth and Ninth Circuits] or the broad definition found in the repealed predecessor statute [as advocated by the government and accepted by the Third, Sixth[2], Seventh and Eleventh Circuits]).

Fourth, this Court could determine whether reference to the prior statutory definition of burglary, 18 U.S.C. (Appendix) § 1202(C)(9)(repealed), since deleted by Congress during its revision of the statute, is proper. See United States v. Hill, 863 F.2d 1575, 1581-82 (11th Cir. 1989). Fifth, in this case the Court could evaluate a burglary which is more clearly

[2]In a recent decision the Sixth Circuit joined the Third, Seventh and Eleventh Circuits in applying the former definition of burglary from the repealed, predecessor statute. United States v. William Henry Taylor, No. 88-6224 (6th Cir. Aug. 9, 1989).

"non-violent" than the burglaries in Carter, which apparently were burglaries of occupied structures. See Brief for the United States at nn. 1 & 3, Carter v. United States, No. 88-7307, petition for cert. filed (U.S. May 22, 1989). Cf. Mo. Rev. Stat. § 569.170 (1986) (discussed immediately, infra).

The Missouri statute, reprinted in Petitioner's appendix at 26a, is particularly suited for review because it was drafted with the obvious intent of delineating between burglaries which were potentially violent and those which were not. Compare Mo. Rev. Stat. § 569.160 (1986) (first degree burglary requires (1) possession of explosives or deadly weapon, or (2) causing or threatening physical injury, or (3) entry into an occupied structure) with Mo. Rev. Stat § 569.170 (1986) (second degree burglary necessarily involves unarmed burglary of unoccupied structures). Given this definition, second degree burglary under Missouri law cannot be a "violent felony" under § 924(e), because one cannot threaten potential physical injury to another without committing burglary in the first degree under Missouri law.

In summary, without further arguing the merits petitioner contends that his case offers more opportunities for this Court to provide guidance and to resolve more completely the conflicts in the circuits. The Solicitor General inaccurately contends that petitioner failed to raise below the issue of whether common law burglary is the proper definition of "burglary" as used in 18 U.S.C. § 924(e)(2)(B), because that issue is subsumed within the issue raised by petitioner. Indeed, the Solicitor General admits that petitioner discussed the common law burglary issue, as well as United States v. Headspeth, 852 F.2d 753 (4th Cir. 1988), although petitioner did not adopt that most restrictive reading of the word burglary. Opposition Brief at 15-16 & n.14.

By accepting review of the broader, more encompassing issue offered by petitioner's case, this Court can resolve more of the

questions that have been and will be brought before it. In contrast, if this Court accepts certiorari in Carter v. United States, No. 88-7307, as the Solicitor General has requested, Opposition Brief at n.15, it will have addressed only whether the proper definition of "burglary" in 18 U.S.C. § 924(e)(2)(B)(ii) is its most restrictive definition, common law burglary. Resolution of that issue will not stem the tide of cases being brought before this court: those that raise the issue of whether lesser degrees of burglary under various state laws are "violent felon[ies]" within the meaning of the statute.

CONCLUSION

Accordingly, this Court should grant certiorari in this case.

Respectfully submitted.

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Supreme Court, U.S.
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No. 88-7194

In The

Supreme Court of the United States

October Term, 1989

ARTHUR LAJUANE TAYLOR

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

Date	*Filings/Proceedings*
6/10/87	Superseding Indictment Filed
1/7/88	Notice of Punishment Enhancement Filed
1/15/88	Plea Agreement Filed
3/1/88	Defendant's Motion to Strike Notice of Punishment Enhancement and Memorandum in Support Filed
3/2/88	Sentencing Proceedings Before the Honorable John F. Nangle
3/2/88	Judgment and Commitment Order Filed
3/10/88	Notice of Appeal Filed

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	No. S1-87-147 CR(1)
ARTHUR LAJUANE TAYLOR,	)	
Defendant.	)	Filed JUN 10 1987

COUNT I

The Grand Jury charges that:

On or about September 25, 1986, in the City of St. Louis, Missouri, within the Eastern District of Missouri,

ARTHUR LAJUANE TAYLOR,

the defendant herein, having previously been convicted:

1. On or about May 27, 1963, in the Circuit Court of the City of St. Louis, Missouri, in cause numbers 489-L, 490-L, and 491-L of the offenses of two counts of Burglary Second Degree and Stealing, and Burglary Second Degree, all of which are felonies under the laws of the State of Missouri;

2. On or about October 5, 1971, in the Circuit Court of the City of St. Louis, Missouri, in cause number 2218-T of the offense of Burglary Second Degree, a felony under the laws of the State of Missouri;

3. On or about June 22, 1971, in Circuit Court of the City of St. Louis, Missouri, in cause number 448-S of the

offense of Robbery First Degree, a felony under the laws of the State of Missouri;

did knowingly and intentionally possess, a firearm in commerce and affecting commerce, to wit: a Volunteer, model MK45, .45 caliber semi-automatic rifle bearing serial number 0754.

In violation of title 18, United States Code, Appendix Section 1202(a)(1).

COUNT II

The Grand Jury further charges that:

On or about December 3, 1986, in the City of St. Louis, Missouri, within the Eastern District of Missouri;

ARTHUR LAJUANE TAYLOR,

the defendant herein, having previously been convicted of:

1. On or about May 27, 1963, in the Circuit Court of the City of St. Louis, Missouri, in cause numbers 489-L, 490-L, and 491-L of the offenses of two counts of Burglary Second Degree and Stealing, and Burglary Second Degree, all of which are felonies under the laws of the State of Missouri;

2. On or about October 5, 1971, in the Circuit Court of the City of St. Louis, Missouri, in cause number 2218-T of the offense of Burglary Second Degree, a felony under the laws of the State of Missouri;

3. On or about June 22, 1971, in Circuit Court of the City of St. Louis, Missouri, in cause number 448-S of the offense of Robbery First Degree, a felony under the laws of the State of Missouri;

did knowingly and intentionally possess, a firearm in commerce and affecting commerce, to wit: a Volunteer, model MK45, .45 caliber semi-automatic rifle bearing serial number 64293.

In violation of Title 18, United States Code, Section 922(g)(1).

COUNT III

The Grand Jury further charges that:

On or about February 2, 1987, in the City of St. Louis, Missouri, within the Eastern District of Missouri;

ARTHUR LAJUANE TAYLOR,

the defendant herein, having previously been convicted of:

1. On or about May 27, 1963, in the Circuit Court of the City of St. Louis, Missouri, in cause numbers 489-L, 490-L, and 491-L of the offenses of two counts of Burglary Second Degree and Stealing, and Burglary Second Degree, all of which are felonies under the laws of the State of Missouri;

2. On or about October 5, 1971, in the Circuit Court of the City of St. Louis, Missouri, in cause number 2218-T of the offense of Burglary Second Degree, a felony under the laws of the State of Missouri;

3. On or about June 22, 1971, in Circuit Court of the City of St. Louis, Missouri, in cause number 448-S of the offense of Robbery First Degree, a felony under the laws of the State of Missouri;

did knowingly and intentionally possess, a firearm in commerce and affecting commerce, to wit: a Volunteer, model MK45, .45 caliber semi-automatic rifle bearing serial number 64292.

In violation of Title 18, United States Code, Section 922(g)(1).

A TRUE BILL.

/s/ Carol (illegible)
FOREPERSON

THOMAS E. DITTMEIER
UNITED STATES ATTORNEY

/s/ Charles A. Shaw
CHARLES A. SHAW
Assistant United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Caption omitted in printing)

NOTICE OF PUNISHMENT ENHANCEMENT

Comes now the United States of America, by Thomas E. Dittmeier, United States Attorney for the Eastern District of Missouri and Richard L. Poehling, Assistant United States Attorney for such District and gives notice to the defendant that upon conviction of the charges set forth in the indictment in this cause, the defendant is subject to the enhanced punishment provisions of Title 18, United States Code Appendix II, Section 1202(a)(1) and Title 18, United States Code, Section 924(e)(1) which provides for imprisonment for a term not less than fifteen (15) years and/or a fine of up to $250,000. The defendant shall not be eligible for probation and/or parole. This punishment range is applicable to each count of the indictment.

In support of the imposition of the enhanced punishment provisions referred to above, the Government intends to utilize the following felony convictions of the defendant:

1. On or about May 27, 1963, in the Circuit Court of the City of St. Louis, Missouri, in cause numbers 489-L, 490-L, and 491-L of the offenses of two counts of Burglary Second Degree and Stealing, and Burglary Second Degree, all of which are felonies under the laws of the State of Missouri;

2. On or about October 5, 1971, in the Circuit Couirt (sic) of the City of St. Louis, Missouri, in cause number

2218-T of the offense of Burglary Second Degree, a felony under the laws of the State of Missouri;

3. On or about June 22, 1971, in Circuit Court of the City of St. Louis, Missouri, in cause number 448-S of the offense of Robbery First Degree, a felony under the laws of the Stae (sic) of Missouri;

4. On December 30, 1966 in the Superior Court for the County of Los Angelas (sic), State of California in cause number 328211 of the offense of Assault With Force, a felony under the laws of California;

5. On December 1, 1966 in the Superior Court for the County of Los Angelas (sic), State of California in cause number 307388 of the offense of Assault By Means Of Force Likely To Produce Great Bodily Injury, a felony under the laws of California.

[Jurat omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Caption omitted in printing)

MOTION OF DEFENDANT TO STRIKE NOTICE OF PUNISHMENT ENHANCEMENT

Comes now Arthur Lajuane Taylor, by Bruce D. Livingston, and requests that this Court strike the government's Notice of Punishment Enhancement under 18 U.S.C. § 924(e)(1) ("Notice"), because the defendant does not have the requisite felony convictions to make him subject to enhanced punishment.

Punishment enhancement is inappropriate with respect to defendant because three of the five convictions relied upon by the government in its Notice filed January 7, 1988 are not predicate offenses within the scope of 18 U.S.C. § 924(e). The convictions for Burglary Second Degree and Stealing relied upon by the government in ¶¶ 1 & 2 of its Notice are not felonies of the type intended by Congress to qualify defendant for punishment enhancement.

Similarly, the government's reliance on the conviction in ¶ 5 of its Notice is inappropriate. After further investigation of this offense, the United States Probation Office for the Eastern District of Missouri concluded that the offense relied upon in ¶ 5 (which actually was convicted on December 1, 1965 not 1966 as set forth in the government's Notice), was not Mr. Taylor. U.S. Probation Officer Donna R. Hoosman specifically requested that this conviction be confirmed and was told by the California authorities that they could not confirm that Mr. Taylor was indeed the person who had been convicted of the

offense. Ms. Hoosman therefore omitted this offense from the convictions listed in defendant's pre-sentencing report. Accordingly, the government's reliance upon the alleged conviction in California in Cause No. 307388, set forth in its Notice at ¶ 5, is unfounded.

Accordingly, defendant moves that this Court strike the government's notice of enhancement under 18 U.S.C. § 924(e)(1). Instead defendant should be sentenced under the provisions of 18 U.S.C. § 922(a)(1) (maximum five year sentence for violating § 922(g)).

[Jurat omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

(Caption omitted in printing)

Statement of facts from memorandum in Support of Defendant's motion to strike

* * *

STATEMENT OF FACTS

In the government's Notice of Punishment Enhancement, it lists and relies upon five felony convictions. Punishment enhancement under 18 U.S.C. § 924(e)(1) is appropriate if the defendant has "three previous convictions . . . for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1). None of the convictions relied upon by the government in its Notice is a drug offense. Taylor's convictions must therefore be "violent felonies" for punishment enhancement to apply.

First, the conviction referenced in ¶ 5 of the government's Notice is not a conviction of defendant. The United States District Court's probation office for this district specifically inquired into the alleged conviction of defendant on December 1, 1965 in Cause No. 307388 in the Superior Court for the County of Los Angeles, State of California. Probation Officer Hoosman specifically inquired into the validity of this conviction and concluded that it was not the defendant. Upon telephoning the appropriate authorities in California, she was told that the 1965 conviction could not be confirmed as positively being defendant in this action Arthur LaJuane Taylor. Accordingly Ms. Hoosman omitted all mention of the offense from defendant's pre-sentencing report. Because the federal probation office for this district did

not include the conviction, relied upon by the government in its Notice at ¶ 5, as a prior conviction of the defendant, the government's reliance upon that conviction is inappropriate and should be stricken by this Court.

With respect to defendant's convictions for Burglary Second Degree, relied upon by the government in its Notice at ¶¶ 1-2, neither of those convictions involved any threat of violence or physical danger to any person. The 1971 conviction relied upon in ¶ 2 involved the burglary of a service station at 2:38 a.m. on September 9, 1971. Two persons were arrested as they existed (sic) from the window of the service station at 3108 South Kingshighway. The third defendant Arthur Taylor, did not enter the building but was found in the cab of a "1967 Chevrolet van type truck." No one was present at the service station which was closed and left with its "night lights" turned on.[1] *See* Police Report, St. Louis Police Department, Sept. 9, 1971. (Attached hereto).

In the 1965 conviction, relied upon by the government in ¶ 1 of its notice of punishment enhancement, no police report is available. However, the United States Probation Office for this District reports that Taylor drove with a friend to the friend's girlfriend's house. Taylor's friend went into the girlfriend's home and returned with items from her house which he told Taylor were his own.

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[1] It is appropriate to examine the actual, underlying nature of the prior convictions to determine whether they are "violent felonies" constituting predicate offenses for punishment enhancement in felon-in-possession cases. *United States v. Sherbondy*, 652 F.Supp. 1267, 1269 (C.D. Cal. 1987).

Taylor waited in the car while his friend was in the girlfriend's house. Taylor was later charged and convicted of burglary second degree.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(caption omitted in printing)

SENTENCING PROCEEDINGS – March 2, 1988

BEFORE THE HONORABLE JOHN F. NANGLE

[2](Wednesday morning, March 2nd, 1988, 10:00 a.m., defendant and counsel present)

THE COURT: United States versus Arthur Taylor.

Mr. Livingston, Mr. Taylor, Mr. Poehling.

Go ahead, Mr. Livingston.

Needless to say a major question concerning this sentencing has been briefed by you, studied by me; right? I mean I represent that to you – considered by me not only, you know, on recent days but previously. And I do not agree with your assessment of the law. I'm going to tell you it's not all black and white and I don't agree with the law. I mean I don't like the idea despite Mr. Taylor's pretty miserable record. I don't like the idea of giving him this hunk of sentence. To me it's ridiculous. But I'm not Congress.

We can go into greater detail and there may be some things that you wanted to point out to me, but I have studied the statutes – I have had this problem before – and I have looked at your brief. And you did a good job. I want to commend you on it. And I trust – I don't guess I have to say I trust that you will appeal from my decision and see what the Eighth Circuit does in that regard.

But you might – you know it's just – I'm not telling you it's all black and white, there is some shade in there.

Second degree, I don't observe any reference in the law to any degrees in burglary nor in the cases. They don't define [3] it. I know that Mr. Taylor had a couple burglary convictions that were burglary second degree as we call that in Missouri.

So that we get the record clear on the offenses, let's make sure that there is – there is one of the offenses that the probation office or no one could check out. Isn't there one alleged offense in California? Is that right, Mr. Poehling and Mr. Livingston?

MR. POEHLING: There was one offense, Your Honor, that the probation people were unable to verify and that was from the State of California assault to do great bodily harm with force I believe. It occurred in approximately 1965.

THE COURT: I'm trying to remember. But, anyway, the offenses listed in Count – same ones, of course, in all the counts but the offenses listed therein, let's just go down the line and make sure that as far as the record is concerned Mr. Taylor agrees or doesn't agree with them.

Let's see, this plea was to Count –

MR. POEHLING: Count III I believe, Your Honor.

THE COURT: Count III. So we will work with that one. I guess they are all the same.

And I'm troubled also by the fact that, you know, 1963 offenses. Personally it bothers me but I just don't –

my hands are tied in my judgment. And it's one of the laws Congress enacted, we all know the reasons.

But this included an offense on May 27th, 1963. The [4] offenses of two counts of burglary second degree and stealing and burglary second degree. Is that correctly stated in there, Mr. Taylor and Mr. Poehling? Have you had certified copies of those?

MR. POEHLING: Yes, Your Honor. Those occurred in the Circuit Court of the City of St. Louis, yes.

Mr. Livingston has had access to the certified copies.

THE COURT: I think what we ought to do is to make the certified copies part of the record so that an appellate judge should he see them can look and see how they appear.

MR. POEHLING: I have no objection to that and I can furnish them to the Court.

MR. LIVINGSTON: Would it be appropriate to include the police report, the one police report that was available that's attached to my brief?

THE COURT: I don't think so. I think when you brief it, should you do that, you can – you're going to refer to Mr. Taylor's participation in the acts and development of that?

MR. LIVINGSTON: Right.

THE COURT: I don't have any problem with it. What I would think, if an appellate court should determine that I'm wrong I think they would send it back to me for a hearing in that regard. You know what I'm

saying? To develop – I think they would want me to go into detail. I got enough problems doing my own job without doing theirs. But you might just – [5] I think if they want it they will get it. So let's just leave this thing with the certified copies of the offenses and then I'm sure –

Let's see, then October 5th, 1971 is another burglary in the Circuit Court of the City of St. Louis. Is that a correct charge and allegation, Mr. Taylor and Mr. Livingston?

MR. LIVINGSTON: I believe it is.

THE COURT: And June 22nd, '71 is robbery first degree. Is there any question about that one?

THE DEFENDANT: No, sir.

THE COURT: So that we are clear, let me see, burglary second – well, you claim that actually three of the offenses were burglaries; right? Three of the four?

MR. LIVINGSTON: No, Your Honor. There are five convictions, two of which –

THE COURT: One of them is kind of left out, the California. You say five including California?

MR. LIVINGSTON: That's right.

THE COURT: We don't have the California conviction as a matter of record here; am I correct?

MR. POEHLING: No, that's incorrect. It was not on the indictment but it was filed, the notice of punishment enhancement that the government filed on January 7th of 1988 sets out the ones you just talked about plus –

THE COURT: Do you have certified copies of them?

[6] MR. POEHLING: Yes.

THE COURT: Okay. That's what I didn't understand. So you do have certified copies and you have seen the certified copies?

MR. LIVINGSTON: Yes, I have seen them.

THE COURT: Let's order that that be made part of the record so we got a full record.

Go ahead, Mr. Livingston.

MR. LIVINGSTON: The only conviction of the five in the government's notice that we are challenging whether or not it actually is the defendant is listed in paragraph 5 of their notice of punishment enhancement. That's – I believe there's a typo, I think it's December 1, 1965 that the certified copies will show is the date. But at any rate the paragraph 5 conviction Mr. Taylor contends is not him. The probation office of this court researched that and attempted to verify that it was him and could not do so. And we would say it's inappropriate to consider that offense for punishment enhancement.

THE COURT: Mr. Poehling, what is your response to that?

MR. POEHLING: Your Honor, the probation office has attempted to verify that and have not been able to.

THE COURT: Is that right, Ms. Hoosman?

MS. HOOSMAN: Yes, sir.

THE COURT: So there's no verification of the charge in paragraph 5.

[7] MR. POEHLING: So with respect of the one that is set forth in number 5, Your Honor, I would agree to withdraw that.

THE COURT: That's what I thought. I had eliminated it.

MR. POEHLING: The fourth one which is under point four which is the California conviction for assault with force, that's not disputed as I understand it. Mr. Taylor acknowledges that is him and it's a valid conviction.

THE COURT: Is that right, Mr. Taylor?

THE DEFENDANT: Yes, Sir.

THE COURT: So we are down to the charges in the notice of punishment enhancement of the four paragraphs we have eliminated the fifth.

Now, with regard to that, one of them is robbery first; right, Mr. Livingston?

MR. LIVINGSTON: That's correct.

THE COURT: Another is assault with force. That's the California thing; right? You're challenging the October 5th, '71 burglary second?

MR. LIVINGSTON: And the May 27th, 1963 burglary second.

THE COURT: And the '63 burglary second. Okay.

You don't have that in here, Mr. Poehling – oh, yes you do. Good Lord. Yes, May 27th, '63 is the first one charged in the indictment and it's also the first one set

out in the notice of punishment enhancement. Okay. They are both the first [8] paragraph and second paragraph of the notice of punishment enhancement referring to burglary second degree, and it's the defendant's position that that's not a viable crime, et cetera, a degree of burglary that was not contemplated by Congress when it enacted 924; is that correct, Mr. Livingston?

MR. LIVINGSTON: That's my position.

THE COURT: Now, separate and apart from that and over and above that is there anything else you want to say to me on this sentencing matter?

MR. LIVINGSTON: Well, I guess if your mind is made up I don't need to waste the Court's time. I do think that my arguments have some validity but we won't go into that.

As far as where you would sentence the defendant, if you recall he was sent to Springfield. A medical report was released and should be in the file indicating substance abuse problem and some other psychological problems and I would appreciate it if the Court would recommend that he at least initially be sent there.

THE COURT: To Springfield?

MR. LIVINGSTON: Yes.

THE COURT: Did you want to add anything, Mr. Taylor? Say anything to me?

MR. TAYLOR: No.

THE COURT: Mr. Poehling?

MR. POEHLING: No, Your Honor.

[9] THE COURT: With regard to the location of Mr. Taylor's incarceration I'm obliged to leave that up to the United States Prison – Department of Justice, U. S. Prison Agency. However, if there is any question about his need for at least temporary incarceration or checking out at Springfield, Ms. Hoosman, would you check into that and see if that is suitable? And if it is appropriate, why, then it should be done.

In view of my approach to this I'm not going to make a lot of comments. I think it's – I do not personally approve of this enactment but I'm faced with it and, as I say, it's not because Mr. Taylor has led such an exemplary life, you skirted around and got yourself into an awful lot of trouble, but that still to me doesn't justify what I have to do here.

So it will be the sentence of this Court on Count III that the defendant be committed to the custody of the Attorney General for imprisonment for a period of fifteen years and he shall not be eligible for probation or parole during that period.

I will order the special assessment of fifty dollars.

Part of this record will include the certified copies of the prior convictions as we indicated in our discussion. And my action is, of course, not based upon the – a little more definitive here on what I will call the second – paragraph 5 of the notice of punishment enhancement, California conviction, which has not been supported in the record.

[10] The other certified copies of convictions will be ordered to be made a part of this record on appeal as well

as the defendant's motion to strike notice of punishment enhancement, which I will deny.

Gentlemen, I think that does it.

You may step down.

MR. POEHLING: Your Honor, the government would ask leave of Court to dismiss Counts I and II of the indictment.

THE COURT: So ordered.

Mr. Livingston, you have done a good job and stick with it.

MR. LIVINGSTON: Thank you, Your Honor.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

(Caption omitted in printing.)

JUDGMENT IN A CRIMINAL CASE

Case Number: S1-87-147Cr (1)

THE DEFENDANT ENTERED A PLEA OF:

[XX] guilty as to count III of the Superseding Indictment.

FILED MAR 2, 1988

EYVON MENDENHALL
E. DISTRICT OF MO.
U. S. DISTRICT COURT

THE DEFENDANT IS CONVICTED OF THE OFFENSE OF: did knowingly and intentionally possess a firearm in commerce and affecting commerce, to wit: a Volunteer, model MK45, .45 caliber semi-automatic rifle bearing serial number 64292 after having been previously been convicted of felonies in the Circuit Court of the City of St. Louis,

In violation of Title 18, United States Code, Section 922(g) (1), as charged in Count III of the Superseding Indictment,

IT IS THE JUDGMENT OF THIS COURT THAT: pursuant to the enhancement provisions of 18 U.S.C., Section 924(e), the defendant is confined to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIFTEEN (15) years as to and under the charge contained in Count III of the Superseding Indictment and shall not become eligible for probation or parole.

Defendant is assessed $50.00 under Count III of the Superseding Indictment pursuant to the Comprehensive Crime Control Act of 1984.

Ordered that the original Indictment and Counts I and II of the Superseding Indictment are hereby dismissed.

Defendant is remanded to the U.S. Marshal.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $50.00 pursuant to Title 18, U.S.C. Section 3013 for Count III. as follows:

IT IS FURTHER ORDERED THAT counts the original Indictment & Counts I & II of the Superseding Indictment are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

[ ] The Court orders commitment to the custody of the Attorney General and recommends:

Date of Imposition of Sentence
March 2, 1988
Honorable John F. Nangle
Date March 2, 1988

ORDER GRANTING PROBATION

STATE OF MISSOURI,	)	CIRCUIT COURT,
	)	CRIMINAL CAUSES
vs.	)	DIV. 1
ARTHUR LEE TAYLOR	)	CASE NO. 489-L,
	)	490-L & 491-L
	)	September 10, 1963

Defendant, appearing in person and by attorney, upon judgment of guilty of the offense of BURGLARY SECOND DEGREE AND STEALING (2 chgs) and BURGLARY SECOND DEGREE heretofore on May 27, 1963 entered, with sentence thereon deferred by the Court; said defendant is now sentenced upon his conviction to serve three years on each cause to run concurrently and execution of sentence suspended, imposition of sentence suspended for a period of three (3) years the Court being satisfied that defendant if permitted to go at large will not again violate the law, said ARTHUR LEE TAYLOR is hereby placed on probation, to report to and be under the supervision of the Probation Officer of the Court, for a period of three (3) years from this date and until discharged by order of Court.

To ARTHUR LEE TAYLOR

It is the order of the Court that you shall comply with the following general and special conditions of probation. The general conditions are as follows: (a) Refrain from the violation of any state and federal penal laws. (b) Live a clean, honest and temperate life. (c) Keep good company and good hours. (d) Keep away from all undesirable places. (e) Work regularly. When out of work, notify your probation officer at once. (f) Do not leave or remain away

from the city or town where you reside without permission of the probation officer. Notify your probation officer at once if you intend to change your address. (g) Contribute regularly to the support of those for whose support you are legally responsible. (h) Report promptly on the dates set forth. If for any unavoidable reason you are unable to do so, communicate with your probation officer without delay. Follow the probation officer's instructions and advice.

The special conditions ordered by the Court are as follows:

Defendant to pay court costs.

Defendant to make resitution in the amount of $15.25 to the Wilkins Food Shop through this office.

You are hereby advised that under the law the Court may at any time revoke your probation for cause, or for a violation of law occurring during the period of probation.

The Court has placed you on probation, believing that if you sincerely try to obey and live up to the conditions of your probation, your attitude and conduct will improve, both to the benefit of the State of Missouri and of yourself.

/s/ Illegible
Judge, Division No. 1

I have read the above order and conditions.

(Signed) Arthur Lee Taylor
Probationer.

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

STATE OF MISSOURI, City of St. Louis.) ss.

BE IT REMEMBERED, That on this the 22nd day of June, 1971 at the regular June Term of the Circuit Court of the City of St. Louis, Division No. 11 thereof, begun and held at the Court House in the City of St. Louis and State aforesaid, before the Honorable Alvin J. McFarland, Judge of the Twenty-second Judicial Circuit of the State of Missouri and Judge of this Court, the following, among other proceedings, were had, to-wit:

THE STATE OF MISSOURI, *Plaintiff*, vs. ARTHUR LEE TAYLOR, *Defendant*.) **Criminal Action, Sentence and Judgment.**

No. 448-S

Now, at this day comes the Assistant Circuit Attorney for the State, and also comes the defendant herein, in person, in the custody of the Sheriff of this City, and in the presence of Raymond Bruntrager, Attorney and Counsel in open Court, whereupon said defendant is informed by the Court that he has heretofore been found guilty of the crime of ROBBERY FIRST DEGREE, and being now asked by the Court if he had any legal cause to show why judgment should not be pronounced against him according to law, and still failing to show such cause, it is therefore sentenced, ordered and adjudged by the Court, that the said defendant: ARTHUR LEE TAYLOR having been found guilty as aforesaid, under an indictment, against him, be committed to State Department of Corrections of the State of Missouri for the period of Five

(5) Years and that the Sheriff of this City shall, without delay, remove and safely convey the said defendant to the said State Department of Corrections, there to be kept, confined and treated in the manner directed by law, and the Director of State Department of Corrections is required to receive and safely keep him the said defendant, in the State Department of Corrections aforesaid, until the judgment and sentence of the Court herein be complied with, or until the said defendant shall be otherwise discharged by due course of law.

It is further considered, ordered and adjudged by the Court, that the State have and recover of said defendant the costs in this suit expended, and that hereof execution issue therefor.

STATE OF MISSOURI, City of St. Louis.) ss.) I, GEORGE M. SOLOMAN,

Clerk of the Circuit Court for Criminal Causes, in and for said City, hereby certify the foregoing to be a full, true and complete copy of the original judgment and sentence of the Court in the cause therein named, as the same appears of record in my office.

WITNESS my hand as Clerk, and the seal of said Court.
Done at office in the City of St. Louis, this 15th day of August, A. D. 1973.

/s/ George M. Solomon

Clerk, Circuit Court of the City of St. Louis, for Criminal Causes.

THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

STATE OF MISSOURI, City of St. Louis.) ss.

BE IT REMEMBERED, That on this the 5th day of October, 1971 at the regular September Term of the Circuit Court of the City of St. Louis, Division No. 16 thereof, begun and held at the Court House in the City of St. Louis and State aforesaid, before the Honorable William E. Buder, Judge of the Twenty-second Judicial Circuit of the State of Missouri and Judge of this Court, the following, among other proceedings, were had, to-wit:

THE STATE OF MISSOURI, *Plaintiff,*	**Criminal Action, Sentence and Judgment.**
No. 2218-T *vs.*	
ARTHUR TAYLOR, *Defendant.*	

Now, at this day comes the Assistant Circuit Attorney for the State, and also comes the defendant herein, in person, in the custody of the Sheriff of this City, and in the presence of George Hubel, Public Defender, Attorney and Counsel in open Court, whereupon said defendant is informed by the Court that he has heretofore entered plea of guilty of the crime of Burglary Second Degree, said plea being accepted by the Court and being now asked by the Court if he had any legal cause to show why judgment should not be pronounced against him according to law, and still failing to show such cause, it is therefore sentenced, ordered and adjudged by the Court, that the said defendant: ARTHUR TAYLOR having pleaded guilty as aforesaid under an information, against him be committed to the State Department of Corrections of the State of Missouri for the period of Three Years (3) and that the Sheriff of this City shall, without delay, remove and

safely convey the said defendant to the said State Department of Corrections, there to be kept, confined and treated in the manner directed by law, and the Director of State Department of Corrections is required to receive and safely keep him the said defendant, in the State Department of Corrections aforesaid, until the judgment and sentence of the Court herein be complied with, or until the said defendant shall be otherwise discharged by due course of law. It is further ordered by the Court that Jail time prior to conviction be allowed defendant.

It is further considered, ordered and adjudged by the Court, that the State have and recover of said defendant the costs in this suit expended, and that hereof execution issue therefore.

STATE OF MISSOURI, City of St. Louis.) ss.

I, JAMES H. McATEER,

Clerk of the Circuit Court for Criminal Causes, in and for said City, hereby certify the foregoing to be a full, true and complete copy of the original judgment and sentence of the Court in the cause therein named, as the same appears of record in my office.

WITNESS my hand as Clerk, and the seal of said Court.
Done at office in the City of St. Louis, this 6th day of October, A. D. 1971.

/s/ James H. McAteer
Clerk, Circuit Court of the City of St. Louis, for Criminal Causes.

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

JUDGMENT

No. 88-1408EM	*	
United States of America,	*	Appeal from the United
Appellee,	*	States District Court
	*	for the Eastern
vs.	*	District of Missouri
Arthur Lajuane Taylor,	*	
	*	Filed Mar. 29, 1989
Appellant.	*	

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

January 4, 1989

A true copy.

ATTEST: /s/ Robert D. St. Vrain
Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT
MANDATE ISSUED 3/20/89

United States Court of Appeals,
Eighth Circuit.

UNITED STATES of America, Appellee,

v.

Arthur Lajuane TAYLOR, Appellant.

No. 88-1408.

Submitted Sept. 19, 1988.

Decided Jan. 4, 1989.

Rehearing and Rehearing En Banc
Denied March 7, 1989.

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and FAGG, Circuit Judge.

McMILLIAN, Circuit Judge.

Arthur Lajuana Taylor pleaded guilty in the District Court[1] for the Eastern District of Missouri to one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). The district court enhanced Taylor's sentence under 18 U.S.C. § 924(e)(1) because of his previous felony convictions and sentenced him to fifteen years in prison with no possibility of probation or parole. For reversal, Taylor argues that the district court erred in considering his prior convictions for burglary in the second degree under Missouri law for purposes of the sentence enhancement provisions of 18 U.S.C. § 924(e)(1). For the reasons discussed below, we affirm the sentence imposed by the district court.

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[1] The Honorable John F. Nangle, Chief Judge, United States District Court for the Eastern District of Missouri.

Taylor appeals only from the imposition of the enhanced sentence.[2] Because the imposition of the sentence arose out of a guilty plea pursuant to a plea agreement, there are no disputed factual issues. The issue on appeal is one of law only.

We have recently considered the issue of whether burglary in the second degree is a "violent felony" in *United States v. Portwood*, 857 F.2d 1221 (8th Cir.1988) and *United States v. Black*, 857 F.2d 1221 (8th Cir.1988) (consolidated for appeal, hereinafter *Portwood*). The reasoning of *Portwood* applies with equal weight to this case.

The sentence enhancement provisions of 18 U.S.C. § 924(e) come into play when one who has been convicted under 18 U.S.C. § 922(g)(1) has three previous convictions for either a "violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). The statute defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year that –

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct

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[2] A ruling favorable to Taylor on this issue would necessitate a remand for resentencing under 18 U.S.C. § 924(a)(1). A prerequisite to sentence enhancement under 18 U.S.C. § 924(e)(1) is three previous convictions. The prior convictions relied upon by the district court in imposing the enhanced sentence were two for burglary in the second degree, one for robbery in the first degree and one for assault.

> that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B).

Burglary in the second degree is defined in the Missouri Revised Statutes as:

> Knowingly enter[ing] unlawfully or knowingly remain[ing] unlawfully in a building or inhabitable structure for the purpose of committing a crime therein.

Mo.Rev.Stat. § 569.170.1.

As a felony, burglary in the second degree is punishable by imprisonment for a term of more than one year. Mo.Rev.Stat. § 556.016.2 The Missouri statutory definition of burglary in the second degree falls squarely within the crimes delineated in 18 U.S.C. § 924(e) as predicate crimes which are to be considered for sentence enhancement purposes.

Taylor argues, however, that burglary in the second degree is not a "violent felony . . . that . . . involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). The gist of his argument is that Missouri law distinguishes between burglary in the first degree which involves the potential for violence and burglary in the second degree which does not. According to Taylor, if any burglary presents a risk of potential injury to an innocent person, it automatically triggers the application of the more serious charge of burglary in the first degree. Mo.Rev.Stat. § 569.160.1(3). In contrast, a charge of burglary in the second degree is triggered when a burglary of an empty building occurs. Mo.Rev.Stat. § 569.170. Taylor argues that such a burglary

carries with it no potential for violence since there is no one present who can be harmed during the commission of the offense. As such, he argues that burglary in the second degree cannot be a "violent felony" in the sense that Congress intended when it enacted 18 U.S.C. § 924(e)(2)(B).

In response to an argument identical to the one posed by Taylor, we held in *Portwood* that "burglary" in the sentence enhancement statute means "burglary" however a state chooses to define it. We stated that:

> Congress could quite reasonably conclude that no matter what the felon's intent upon breaking in, the property owner may return, a neighbor may investigate, or a law enforcement official may respond. All of these scenarios present a grave threat of harm to persons. A person with . . . prior convictions for burglary, regardless of the details of each burglary, presents the type of potential threat to society that Congress sought to control by the enactment of § 924(e).

857 F.2d at 1224. Based on the reasoning of *Portwood*, we hold that the district court did not err in considering Taylor's prior convictions for Missouri burglary in the second degree as predicate offenses which, in conjunction with his other prior convictions, subject him to an enhanced sentence under 18 U.S.C. § 924(e).

Accordingly, the judgment of the district court is affirmed.

BRIGHT, Senior Circuit Judge, dissenting.

I dissent.

The majority follows the holding of *United States v. Portwood*, 857 F.2d 1221 (8th Cir.1988). In *Portwood*, the court held that Missouri's second degree burglary statute satisfies the definition of burglary as used by Congress in 18 U.S.C. § 924(e). According to *Portwood*, "the statute says 'burglary,' and we take that to mean 'burglary,' however a state may choose to define it." *Portwood*, 857 F.2d at 1223-24. Neither *Portwood*, nor this case, can be justified on careful examination of the federal statute and its legislative history.

Section 924(e) does not define "burglary." As a matter of statutory construction, "[w]here Congress uses terms that have accumulated settled meaning under either equity of the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329, 101 S.Ct. 2789, 2794, 69 L.Ed.2d 672 (1981). *See also Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 249, 96 L.Ed. 288 (1952).

"Burglary" has a common law meaning: "the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." W. LaFave & A. Scott, Jr., *Criminal Law* 792 (2d ed. 1986). Modern status setting out offenses denominated as burglary may or may not possess the common law elements of burglary. As such, burglary does not have an established "modern" meaning. Moreover, no language in the enhancement statute dictates a meaning other than the common law meaning. *See United States v. Headspeth*, 852 F.2d 753, 757-58 (4th Cir.1988).

The Eighth Circuit's interpretation of the statute produces an anomalous result, demonstrated by a comparison to *Headspeth*. In *Headspeth*, the court considered the application of section 924(e) to a defendant with two convictions for robbery and a third conviction, there in question, for the crime of "storehouse breaking," under Maryland law. Conduct amounting to storehouse breaking in Maryland (breaking into a storehouse in day or night with intent to commit a felony or theft of property of the value of $300 or more) would be at least second degree burglary in Missouri.[1] *Compare id.* at 756 (quoting Md.Ann.Code art. 27, § 32 (1971)), *with* majority op. at 626-27. *Headspeth* concluded that storehouse breaking did not constitute burglary under the enhancement provision and thus an enhanced penalty did not apply to the defendant.

The majority, however, subjects Taylor to the enhanced penalty because the State labeled his conduct burglary. Following the majority's analysis to its logical conclusion, a traffic offense of wrongful parking, i.e., the taking of someone else's privilege of using a parking space, if labeled burglary by a state, could be used to enhance a sentence under section 924.

---

[1] Taylor was convicted of second degree burglary in 1971. Effective January 1, 1979, the Missouri second degree burglary statute was amended. *See* Mo.Ann.Stat. § 569.170 (Vernon 1979). The majority and the parties cite the present second degree burglary statute. For the purposes of this case, I assume the revision did not make a substantive change in the statute, as it applied to the defendant. *See State v. Eaton*, 504 S.W.2d 12, 15 (Mo.1973).

I do not believe the application of a federal sentence enhancement provision should turn on the differing labels given to similar conduct by the various states. Such application treats similarly situated persons differently for the purpose of a federally imposed sentence. I find it unlikely Congress would have intended such a result. *Cf.* U.S.Sent.Comm.Sent. Guidelines at 2 (Oct. 1987) (Congress sought *uniformity* in sentencing by narrowing the wide disparity in sentences imposed by difference federal courts for similar criminal conduct by similar offenders.) Unfortunately, neither the majority nor *Portwood* gives consideration to section 924's legislative history. *Headspeth*'s analysis of the legislative history is instructive and dispositive. The opinion by Circuit Judge Phillips of the Fourth Circuit stated:

> The government argues, however, that the legislative history and purpose of the § 924(e) sentence enhancement provision demonstrate that Congress intended the term burglary to have a more expansive definition than obtained at common law. We disagree.
>
> At one point, § 924(e) did indeed contain a definition of burglary which would encompass Maryland's storehouse breaking offense. As originally enacted, § 924(e)'s sentence enhancement provision was triggered only by previous convictions for either "robbery" or "burglary." Section 924(e)(2)(B) then specifically defined "burglary" as "any crime punishable by a term of imprisonment exceeding one year and consisting of entering or remaining surreptitiously within a building that is the property of another with intent to engage in conduct constituting a Federal of State offense." This definition of burglary, which was considerably broader than its common law counterpart, would of course cover

storehouse breaking, as that offense is defined in Maryland.

But this broad statutory definition of burglary was extremely short-lived. Two days after § 924(e) was enacted – and several months before it became effective – Congress began to consider expanding the list of predicate offenses that would trigger it. *See* Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 44 (May 21, 1986) [hereinafter Hearing]. At the ensuing hearings, there was a general consensus that the specific predicate offenses of "robbery" and "burglary," together with their respective definitions, should be replaced with the more general terms "serious drug offense" and "violent felony." *See* H.R.Rep. No. 849, 99th Cong., 2d Sess. 3 (1986). There was considerable disagreement, though, about how to define the term "violent felony."

> One proposed amendment, introduced by Representative Wyden of Oregon, favored a broad definition which would include crimes against both person and property:
>
> (A) an offense that has as an element the use, attempted use, or threatened use of physical force against the person *or property* of another; or
>
> (B) any felony which, by its nature, involved a substantial risk that physical force against the person *or property* of another may be used in the course of committing the offense.

H.R. 4639, 99th Cong., 2d Sess. (1986) (emphasis added). This proposal drew a flurry of criticism, for the inclusion of property crimes was thought to be an unwarranted extension of federal criminal jurisdiction which would

both encroach upon state sovereignty and overload the federal prison system. *See*, e.g., Hearing at 11 (statement of Rep. Hughes).

A second proposal, introduced by Representatives Hughes and McCollum, would have defined the term "violent felony" much more narrowly as "any State or Federal felony that has *as an element* the use, attempted use, or threatened use of physical force against the *person* of another." H.R. 4768, 99th Cong., 2d Sess. (1986) (emphasis added). This definition would have excluded burglary as a predicate offense, because the actual or threatened use of force against the person is not an element of that offense, either at common law or under the original § 924(e)(2)(B). *See* Hearing at 26 (Statement of Rep. Hughes) (indicating that the exclusion of burglary was deliberate).

The Hughes/McCollum proposal was roundly criticized for its failure to include burglary, arson, and other violent crimes against property which, though they did not have the actual or threatened use of force against the person as an element, nonetheless posed a severe inherent danger to human life. *See*, e.g., Hearing at 9 (statement of Rep. Wyden); *id.* at 23-24 (statement of James Knapp, Deputy Ass't Attorney General, Crim. Div., U.S. Dept. of Justice).

The amendment that was ultimately passed, and now appears as 18 U.S.C. § 924(e)(2)(B), was a compromise of sorts. It defined the term "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year that –

> (i) has *as an element* the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

Pub.L.No. 99-570, 100 Stat. 3207 (1986) (emphasis added). The § 924(e)(2)(B)(ii) catch-all, which permits certain felonies against property to serve as the basis for sentence enhancement, was designed to satisfy the proponents of H.R. 4639, while the limitation of that provision to crimes which present a serious risk of injury to the *person* was a concession to those who favored H.R. 4768.

> Though the amended statute lists burglary as a predicate offense, it specifically deletes the broad definition of that term which has appeared in the original version of the statute. This omission, viewed in light of the efforts to remove burglary altogether from the list of predicate offenses, suggests that Congress intended to revert to the narrow common law definition of burglary in the amended statute. The common law definition is, to be sure, more consistent with the amended statute's focus on conduct which poses a serious potential risk of injury to the person. Absent more persuasive evidence that Congress intended the term "burglary" in amended § 924(e)(2)(B) to mean something else, we are reluctant to depart from the usual presumption that Congress intended the term to be given its common law meaning. Accordingly, we hold that the term "burglary," as used in § 924(e)(2)(B)(ii), means the breaking and entering of the dwelling house of another, in the nighttime, with the intent to commit a felony therein. So defined, the term "burglary" does not encompass storehouse breaking, as that offense is defined under Maryland law.

Headspeth, 852 F.2d at 757-58 (footnote omitted).

For these reasons, I would hold that Missouri's second degree burglary is not "burglary" under section 924(e)(2)(B)(ii). Additionally, Missouri's second degree burglary does not fall within the statutory phrase of section 924(e) "or otherwise involves conduct that presents a serious risk of physical injury to another." That issue was also addressed in *Headspeth*.

Nor do we believe, as the government suggests, that the crime of storehouse breaking set forth in M.D.Code Ann. art. 27, § 32 is an offense which, in the language of the statute, "otherwise involves conduct that presents a serious potential risk of physical injury to another." As was noted in argument before this court, the catch-all language "otherwise involves conduct that presents a serious potential risk of physical injury to another" is, in context, ambiguous. It could be read to refer, as did H.R. 4639, only to offenses which *by their very nature* pose a risk of injury to another. Since the specifically enumerated crimes that precede the catch-all language – "burglary," "arson," "extortion," and "use of explosives" – are all offenses which by their very nature obviously pose an inherent risk of injury to the person, this interpretation may be the most plausible. On this view, the offense of storehouse breaking at issue here could not fairly be called a "violent felony" within the meaning of § 924(e)(2)(B)(ii), for by its very nature, storehouse breaking generally involves unoccupied buildings. While particular instances of storehouse breaking may, on occasion present some risk of injury to a person, the crime itself is

not one which, like common law burglary, arson, extortion and the use of explosives, poses such a risk *by its very nature.*

Headspeth, 852 F.2d at 758-59.

Missouri law, by definition, distinguishes burglaries which are potentially violent and those not showing violence or threats of violence. Burglary in the first degree encompasses entry into a building when armed or when the burglar causes or threatens physical injury to a person not a participant in the crime or where a person other than a participant is present in the building. Mo.Ann.Stat. § 569.160.1 (Vernon 1979). In contrast, burglary in the second degree, quoted in the majority opinion at 626, may relate to an unarmed burglary of an unoccupied building. *See, e.g., State v. Eaton*, 504 S.W.2d 12 (Mo.1973).

Thus, the conviction for second degree burglary under Missouri law, relating as it does to entry into a structure without an occupant, poses no threat of harm to persons.

The comment in the majority opinion at 627, quoting *Portwood*, 857 F.2d at 1224, that any conduct which may be a burglary under any state law, regardless of the details, "presents the type of potential threat to society that Congress sought to control by the enactment of § 924(e)" does not accord with the legislative history previously quoted in this opinion.

Moreover, it seems perfectly clear that the language of the statutory provision here in question, underlined in

the footnote,[2] relates to crimes other than burglary (under common law), arson, or extortion which may present "a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

I add a final comment. Institutionally, a panel of this court must follow the rule of law laid down in a prior panel opinion. Only the en banc court can overrule a published panel opinion. Nevertheless, neither this panel nor this writer need uncritically accept a prior panel opinion which may be flawed. I suggest the rule of this case and *Portwood* in deciding that every burglary defined under state law qualifies as a "violent felony" pursuant to 18 U.S.C. § 924(e)(2)(B)(ii) needs re-examination by this court en banc or by the United States Supreme Court.

---

[2] Section 924(e)(2)(B)(ii) reads:

> (ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*. (Emphasis added).

UNITED STATES COURT OF APPEALS

For The Eight Circuit

No. 88-1408-EM

United States of America, Appellee, vs. Arthur Lajuane Taylor, Appellant.	* * * * * * * *	Appeal from the United States District Court for the Eastern District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

March 7, 1989

SUPREME COURT OF THE UNITED STATES

No. 88-7194

Arthur Lajuane Taylor,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eighth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 10, 1989

Supreme Court, U.S.
FILED
DEC 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-7194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ARTHUR LAJUANE TAYLOR

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTION PRESENTED

Petitioner Arthur Lajuane Taylor was sentenced to enhanced punishment under 18 U.S.C. § 924(e)(1) (Supp. V 1987) as a person "with three previous convictions . . . for a violent felony." Section 924(e)(2)(B) defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year that . . . (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Section 924(e) fails to define "burglary" despite its diverse meanings under federal, state and common law. In a 2-1 decision, the court of appeals declared that petitioner's prior Missouri convictions for burglary in the second degree satisfy § 924(e)'s predicate "violent felony" offenses and concluded "that 'burglary' in the sentence enhancement statute means 'burglary' however a state chooses to define it."

The question presented is whether the court of appeals erred in holding that under 18 U.S.C. § 924(e) a "violent felony" includes any crime labeled a "burglary" by any state, and further, if the court of appeals erred, whether second degree burglary under Missouri law is a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(ii) (Supp. V 1987).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 864 F.2d 625 (8th Cir. 1989) and is reprinted in the Joint Appendix. J.A. 33-45. A transcript of the Sentencing Proceedings before the United States District Court for the Eastern District of Missouri, the Honorable John F. Nangle, Chief Judge, is also reprinted in the appendix. J.A. 13-21.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1989, J.A. 32, and a petition for rehearing or rehearing en banc was denied on March 7, 1989. J.A. 46. The petition for a writ of certiorari was filed on May 6, 1989. The petition was granted on October 10, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS INVOLVED

Section 1402 of Subtitle I of the Anti-Drug Abuse Act of 1986, 18 U.S.C. § 924(e) (Supp. V 1987), provides in pertinent part:

> (e)(1) In the case of a person who violates section 922 (g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.
>
> (2) As used in this subsection

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.) the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the first section or section 3 of Public Law 96-350 (21 U.S.C. 955a et seq.) for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law; and

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

STATEMENT OF THE CASE

1. Introduction.

This case raises a question of interpretation of the term "violent felony," as used in a sentence enhancement provision applicable to persons convicted of possessing a firearm in violation of 18 U.S.C. § 922(g) and who have "three previous convictions . . . for a violent felony or a serious drug offense." Career Criminal Amendments Act of 1986, Subtitle I of the Anti-Drug Abuse Act of 1986, Pub. L.

No. 99-570, §§ 1401-02, 100 Stat. 3207, 3207-39 to 3207-40 (1986) (codified at 18 U.S.C. § 924(e)(1) (Supp. V 1987)). Specifically at issue are petitioner's prior convictions for burglary second degree under Missouri law. *See infra*, p. 6n.1. In defining "violent felony," Congress used the undefined term "burglary," 18 U.S.C. § 924(e)(2)(B)(ii) (Supp. V 1987), which is susceptible to varying meanings under state, federal and common law. In addition to enumerating specific offenses such as burglary in the definition of a "violent felony," Congress added a catchall provision which includes as predicate offenses those crimes that involve "conduct that presents a serious risk of physical injury to another." *Id.*

If petitioner's second degree burglary convictions are not within the purview of either the undefined term "burglary" or the catchall provision of § 924(e)(2)(B)(ii), he would not have the requisite three convictions for a "violent felony" that are needed for an enhanced sentence under § 924(e)(1). *See infra* pp. 33-35. In that event, reversal and remand for re-sentencing would be mandated under the pre-Sentencing Guidelines provision in effect at the time the offense was committed. *See* 18 U.S.C. § 924(a)(1) (Supp. V 1987) (providing five-year maximum sentence with opportunity for parole), *amended by* 18 U.S.C.A. § 924(a)(2) (West Supp. 1989). The enhanced sentencing provision provides for a mandatory minimum sentence of fifteen years without opportunity for parole. 18 U.S.C. § 924(e)(1).

2. Proceedings in the District Court.

Petitioner pleaded guilty on January 15, 1988 to Count III of the superseding indictment, J.A. 22, charging him with being a felon in possession of a firearm on February 2, 1987 in violation of 18 U.S.C. § 922(g). *See* Plea Agree-

ment, Jan. 15, 1988, ¶2. Petitioner had previously been convicted of two violent felonies against the person of another, Robbery First Degree and Assault with Force. Notice of Punishment Enhancement ¶¶ 3-4, J.A. 7. Under 18 U.S.C. §924(e)(1), petitioner would be subject to enhanced punishment if he had three prior convictions for a "violent felony." The Government notified petitioner that it would seek an enhanced sentence based upon the robbery and assault convictions, in combination with 1971 and 1963 convictions for Burglary Second Degree under Missouri law. Notice of Punishment Enhancement, J.A. 6-7. Certified copies of the burglary convictions, *id.* ¶¶ 1-2, as well as the robbery and assault convictions, *id.* ¶¶ 3-4, were ordered to be incorporated into the record at the time of sentencing. Transcript of Sentencing Proceedings, J.A. 20-21. The assault conviction in the fifth paragraph of the Notice of Punishment Enhancement could not be corroborated by the probation office, was withdrawn by the Government and not considered by the district court for enhancement purposes. J.A. 17-18, 20.

At petitioner's sentencing on March 12, 1988, the Honorable John F. Nangle, Chief Judge, United States District Court for the Eastern District of Missouri, denied petitioner's Motion to Strike [the Government's] Notice of Punishment Enhancement, J.A. 21, and sentenced petitioner to a term of 15 years imprisonment without possibility of parole, pursuant to the enhancement statute. J.A. 20. As a condition of defendant's agreement to plead guilty, petitioner retained the right to appeal the issue of whether he had the requisite three convictions for "violent felon[ies]" that would subject him to punishment enhancement under 18 U.S.C. §924(e)(1). *See* Transcript of Sentencing Proceedings, J.A. 13.

3. Proceedings in the Court of Appeals.

Petitioner appealed to the United States Court of Appeals for the Eighth Circuit on the sole issue of whether his sentencing pursuant to the enhancement statute, 18 U.S.C. §924(e)(1), was proper. Petitioner argued that his convictions for burglary in the second degree under Missouri law were not "violent felonies" under the enhancement statute, Ct. A. Br. at 4, and therefore that he should have been sentenced to a *maximum* sentence of five years imprisonment *with* the possibility of parole under the provisions of former section 924(a)(1). 18 U.S.C. §924(a)(1) (Supp. V 1987), *subsequently amended* 18 U.S.C.A. §924(a)(1) (West Supp. 1989).

A divided panel of the court of appeals (McMillian & Fagg, JJ., with Bright, Sr. J., dissenting) affirmed the district court's sentence. J.A. 33-36. The panel majority held that "burglary," as used by Congress in the definition of "violent felony" in §924(e)(2), is unambiguous and "means 'burglary' however a state chooses to define it." J.A. 36. On that basis the majority determined that petitioner's second degree burglary convictions subjected him to the mandatory minimum sentence enhancement of fifteen years imprisonment without chance for parole under §924(e). The panel majority reached this conclusion notwithstanding that certain conduct which would be labeled a "burglary" in some states, *e.g.*, Missouri, would not be so denominated in certain other states, *e.g.*, Maryland. J.A. 38 (Bright, Sr. J., dissenting).

As Senior Judge Bright noted in dissent, the term "burglary" is ambiguous because the range of conduct in contemporary offenses labeled "burglary" varies widely and is significantly different from the common law: the

breaking and entering of a dwelling of another in the nighttime with the intent to commit a felony. J.A. 37. Judge Bright disagreed with the majority's conclusion only after "careful examination of the federal statute and its legislative history." J.A. 37. Had the majority examined the legislative history of section 924(e), it would have realized that Congress specifically *deleted* from the statute a broad definition of burglary that would have included the burglary convictions relied upon by the majority, as well as most other state law burglaries. J.A. 39-40, 42-43. Judge Bright determined that the statute as amended was intended to include as predicate offenses only those burglaries which present a "serious potential risk of injury to the person." J.A. 42.

Moreover, Judge Bright criticized the majority opinion because it led to the anomalous result that identical conduct would lead to dramatically different sentences based solely upon the nomenclature given an offense, rather than upon the underlying conduct itself. "I do not believe the application of a federal sentence enhancement provision should turn on the differing labels given to similar conduct by the various states." J.A. 39.

Finally, Judge Bright analyzed the current Missouri statutory framework and concluded that burglary in the second degree[1] is neither a "violent felony" nor within

[1] The Missouri burglary statute upon which both petitioner and the Government have to date focused in proceedings before the district court, court of appeals and this Court, differs to some degree from the statute in force at the time of the subject burglary convictions. As Judge Bright noted in his dissent, petitioner's burglary convictions pre-dated the enactment of Mo. Rev. Stat. § 569.170 (1986), which became effective January 1, 1979. J.A. 38 n.1. Judge Bright assumed that the revision did not make a substantive change in the statute, as

§ 924(e)'s catchall statutory phrase, ". . . or otherwise involves conduct that presents a serious risk of physical injury to another." J.A. 43.

Missouri law, by definition, distinguishes burglaries which are potentially violent and those not

applied to petitioner. *Id.*

While the Missouri burglary statutes that pre-dated the current versions of first and second degree burglary are substantively different from them, they too distinguished between degrees of burglary and retained the emphasis upon potential for violence to persons in "Burglary in First Degree." *See* Mo. Rev. Stat. § 560.040 (1969) (repealed 1979) (first degree burglary when breaking and entering occupied dwelling house of another either forcibly, while armed or by picking the lock). In its predecessor burglary statutes, Missouri had seven separate offenses denominated as Burglary in the Second Degree and one identified as Burglary with Explosives. *See* Mo. Rev. Stat. §§ 560.045-.060, .070-.080, .100 (1969) (repealed 1979). Under the prior Missouri statute, Burglary with Explosives by its nature could be only first degree burglary under the successor (current) statute. *Compare* Mo. Rev. Stat. § 560.100 (1969) (repealed 1979) (burglary with explosives) *with id.* § 569.160(1) (1986) (burglary involving use of explosives would be first degree burglary under current statute). The other second degree burglaries under the prior statute included conduct that could fall into either degree of burglary in the successor statute. *See, e.g.*, Mo. Rev. Stat. § 560.070 (1969) (repealed 1979) (would include burglary of a store, whether occupied or not).

Crimes labeled burglary second degree under Missouri's prior, repealed statute could have included unarmed burglaries of unoccupied structures, which would have had less potential for violence than the burglaries sought to be reviewed by the Government in *Carter* v. *United States*, *petition for cert. filed*, No. 88-7307, (U.S. May 22, 1989), which apparently involved the burglary of an occupied building. *See* Brief of the United States at nn.1 and 3, *Carter* v. *United States*, *supra*. As such, the instant case is the more appropriate vehicle for reviewing the ambiguity inherent in § 924(e)(2)(B)(ii), irrespective of whether the focus herein is upon Missouri's past or present burglary statute. *See infra*, pp. 33-35.

> showing violence or threats of violence. Burglary in the first degree encompasses entry into a building when armed or when the burglar causes or threatens physical injury to a person not a participant in the crime, or where a person other than a participant is present in the building. In contrast, burglary in the second degree quoted in the majority opinion at [J.A. 35], may relate to an unarmed burglary of an unoccupied building.
>
> Thus, the conviction for second degree burglary under Missouri law, relating as it does to entry into a structure without an occupant, poses no threat of harm to persons.

J.A. 44 (citations omitted) (discussing Mo. Rev. Stat. §§ 569.160-.170 (1986)). As set forth *supra* n. 1, many of the second degree burglaries under Missouri's predecessor burglary statute were likewise non-violent, because they too could involve unarmed burglaries of unoccupied buildings. *See, e.g.*, Mo. Rev. Stat. §§ 560.045, 560.070, 560.080 (1969) (repealed 1979).

Judge Bright also noted that the majority opinion had ignored established precedent of this Court: when federal statutes use undefined terms which have an accepted common law meaning, it is presumed that Congress intended the common law meaning to control. J.A. 37 (citing *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981) and *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)). He concluded that because "burglary" was not defined in the statutory framework of section 924(e), Congress must have intended to employ the common law meaning of burglary in the sentence enhancement statute. J.A. 42-43.

SUMMARY OF ARGUMENT

The Eighth Circuit erred in holding that any crime labeled a "burglary" by any state constitutes a predicate

offense for sentence enhancement under 18 U.S.C. § 924(e) as a "violent felony." Notwithstanding the use of the word "burglary" by Congress in the definition of "violent felony," the Eighth Circuit's interpretation would improperly include as predicate offenses such crimes as shoplifting, breaking into a pay telephone, and unarmed burglaries of unoccupied structures, including automobiles. This overbroad interpretation arises from the panel majority's erroneous finding that the undefined term "burglary" is unambiguous. To the contrary, when undefined, "burglary" *is* ambiguous because it has been given numerous definitions at federal, state and common law.

This ambiguity necessitates resort to the legislative history to attempt to determine what Congress meant when it drafted the definition. The legislative history indicates that when Congress used the term "burglary" in the definition of "violent felony," it only intended to include those burglaries and other crimes against property which involve conduct presenting a serious potential risk of physical injury to others. Many burglaries do not present such a risk. Significantly, the two previous ways in which Congress included nearly all burglaries within the scope of a categorical definition, whether "violent felony" or "crime of violence," were considered and eliminated by Congress when it adopted the present definition of violent felony.

The Eighth Circuit's inclusion of a crime as a predicate offense based solely upon its nomenclature cannot be correct, because such a test results in the inclusion of offenses which by definition include elements that do not necessarily or even possibly involve conduct which presents a serious potential risk of physical injury to another. Inclusion of such offenses offends Congressional intent, as

evidenced by the legislative history and the statute's bald language: "*violent* felony." 18 U.S.C. § 924(e)(1) (emphasis added). The Eighth Circuit's test further results in identical, non-violent conduct—*e.g.*, unarmed break-ins to unoccupied structures or vehicles—being subject to vastly different penalties, based solely upon differing labels employed by sundry state legislatures. The Eighth Circuit's interpretation of the statutory definition incongruously includes many non-violent felonies, and thus is inconsistent with the definition intended by Congress and the plain language of the statute itself.

Contrary to the Government's position, the generic definition of burglary in the repealed federal statute, Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a), 100 Stat. 456, 458-59 (1986) (essentially reincorporating into § 924(e) with minor changes 18 U.S.C. (Appendix) § 1202(c)(9) (Supp. II 1984) (repealed)), standing alone, cannot be the federal interpretation of the word burglary, because that definition was specifically deleted from the statute as part of the enactment of the pertinent statutory language at issue, 18 U.S.C. § 924(e).

Petitioner suggests that this Court should construe the enhancement provision by limiting the term "burglary" to those crimes under state law which by definition include an element necessary for conviction that involves conduct that presents a serious potential risk of physical injury to others. This construction is consistent with the plain language of the term which burglary is modifying, "*violent* felony." Moreover, this categorical approach eliminates the need for mini-trials and investigations into the underlying circumstances of crimes which may have been committed in the distant past, thereby avoiding the attendant problems of witness availability and faded memories. This categorical, "violence as an element of the offense" test

also comports with the intentions of Congress as reflected in the legislative history.

Similarly, this Court should construe the catchall clause of § 924(e)(2)(B)(ii) (". . . or otherwise involves conduct that presents a serious potential risk of physical injury to another") so as to include only those offenses which include such risks as an element of the offense.

The Government may contend that petitioner's suggested approach will result in some potentially violent burglaries being disqualified from use for purposes of enhancement. Theoretically, this is especially possible where the subject conviction is under a state statute that proscribes equally both conduct that is potentially violent *and* conduct that is not so. This threat may be illusory, however, given that it is often impossible to ascertain whether or not a conviction obtained under such statutes involved potentially violent conduct. Be that as it may, the possibility that such potentially violent conduct will "slip through the cracks" is outweighed by the certainty that many "non-violent" burglaries will force enhancement under either of the respective standards embraced by the Government and by the Eighth Circuit below. Such a result—which is at odds with the statutory language and Congressional intent—would offend principles of due process and the rule of lenity.

Burglary second degree under current or prior Missouri law is not necessarily a crime of violence. Therefore, the court of appeals' enhancement of petitioner's sentence based upon such convictions should be reversed.

ARGUMENT

ONLY THOSE BURGLARIES AND SIMILAR CRIMES UNDER STATE LAW THAT INCLUDE AS AN ELEMENT OF THE OFFENSE NECESSARY FOR CONVICTION CONDUCT WHICH PRESENTS A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY TO OTHERS SHOULD BE CONSIDERED PREDICATE OFFENSES FOR SENTENCE ENHANCEMENT AS "VIOLENT FELON[IES]" UNDER 18 U.S.C. § 924(e) (SUPP. V 1987).

I. The Word "Burglary" As Used In 18 U.S.C. § 924(e)(2)(B)(ii) Is Ambiguous And Therefore Requires Resort To The Legislative History To Determine The Meaning That Congress Intended.

Although Congress used the word "burglary" in its definition of "violent felony," 18 U.S.C. § 924(e)(2)(B),[2] it failed to define that term. *See* 18 U.S.C. § 921 (1982 & Supp. V 1987). "Burglary" is ambiguous, because it is unclear whether the term refers to common law burglary,[3] to crimes having common set of elements,[4] or to

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[2] A "violent felony" is:

> Any crime punishable for a term exceeding one year that—
>
> (i) Has as an element the use, attempted use, or threatened use, of *physical force against the person of another*; or
>
> (ii) Is *burglary*, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

18 U.S.C. § 924(e)(2)(B) (emphasis added).

[3] When "a federal criminal statute uses a common law term of established meaning without otherwise defining it, the general practice is to give that term its common law meaning." *United States* v. *Turley*, 352 U.S. 407, 411 (1957). *See NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). Common law burglary "consisted of a breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony therein." *Black's Law Dictionary* 179 (5th ed. 1979).

[4] *See United States* v. *Brandenburg*, 144 F.2d 656 (3d Cir. 1944). "Burglary" as used in the Fugitive Felon Act refers only to those state and federal statutes that have the same elements as common law burglary. *Id.* at 662.

any of the various crimes that the states and Congress[5] have labeled burglary. The term "burglary" has no fixed, universally accepted definition, and thus is not susceptible to a uniform interpretation. *See United States* v. *Hill*, 863 F.2d 1575, 1582 n.5 (11th Cir. 1989) (collecting statutes in thirty-six states and showing wide range of proscribed conduct).

Of the statutes examined in *Hill*, twenty-six "varied the degree of the burglary by the type of structure, whether the structure was occupied, when the burglary occurred and/or whether injury occurred or was threatened." *Id.* Some modern burglary statutes would permit a "burglary conviction for such acts as stealing from an unoccupied phone booth, car or cave." 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.13(g) at 477 (2d ed. 1987) [hereinafter *LaFave & Scott]*. For example, shoplifting constitutes burglary under the California statute, *see United States* v. *Chatman*, 869 F.2d 525, 529 n.2 (9th Cir. 1989), and breaking into a vending machine or automobile is burglary under the Texas statute. Tex. Penal Code Ann. §§ 30.03 (coin-operated machine), and 30.04 (vehicle) (Vernon 1989). *See United States* v. *Leonard*, 868 F.2d

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[5] In a predecessor statute to § 924(e), Congress defined burglary as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." 18 U.S.C. (Appendix) § 1202(c)(9) (Supp. II 1984). That definition was substantially reincorporated into § 924(e)—for a period of approximately five months until adoption of the present statutory language from the Career Criminals Amendments Act of 1986—by the Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a), 100 Stat. 456, 458-59 (1986). It is anticipated that the Government will urge the adoption of this definition in the present case. However, as noted below, such a test would lead to convictions for non-violent crimes like shoplifting (under California law) being used as predicate "violent felonies," clearly an unfair and unintended result.

1393, 1935 n.2 (5th Cir. 1989). Such acts do not necessarily involve a serious risk of physical harm to other persons. Although common law burglary—the breaking and entering of a dwelling house of another in the nighttime—might more plausibly be said to carry such a risk, modern statutory burglary "has little in common with its common law ancestor except for the title of burglary." *LaFave & Scott* at 476.

Thus, the term burglary has varying, inconsistent meanings, some involving potential physical violence toward other persons, others involving only various forms of trespass to property. *Compare* Mo. Rev. Stat. § 569.160 (1986) (entry with intent to commit felony when either burglar is armed, structure is occupied, or burglar threatens harm); *id.* § 560.040 (1969) (repealed 1979) (breaking and entering occupied dwelling house forcibly or while armed) *with* Mo. Rev. Stat. § 569.170 (1986) (unarmed entry into unoccupied structure); *id.* § 560.080 (1969) (repealed 1979) (breaking and entering vacant, unoccupied building). *Cf.* Fla. Stat. Ann. § 810.02.(3) (third degree burglary is unarmed entry into unoccupied structure or conveyance) (West Supp. 1989).

The ambiguity of "burglary" is highlighted by the failure of Congress to define the term in the statute at issue here, Section 924(e). *See* Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a), 100 Stat. 456, 458 (1986) (containing prior definition of burglary, which was deleted when present § 924(e) was adopted by passage of the Career Criminals Amendments Act of 1986). This ambiguity necessitates resort to the legislative history to determine Congressional intent, as Judge Bright properly observed in his dissent. J.A. 39.

II. The Legislative History Reveals That Congress Intended To Include As Predicate Offenses Only Those Burglaries Punishable By A Term Of Imprisonment For More Than A Year Which Necessarily Involve Serious Potential Risk Of Physical Injury To Other Persons And To Eliminate As Predicate Offenses Those Burglaries Which Do Not Involve Such Risk.

The present version of § 924(e) was enacted as part of the Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1401, 100 Stat. 3207, 3239 (1986). In passing this act, Congress hoped to increase federal law enforcement participation "in efforts to curb armed, habitual drug traffickers, and *violent* criminals." H.R. Rep. No. 98-849, 99th Cong., 2d Sess. 1 (1986) (emphasis added) [hereinafter "*House Report*"]. Section 924(e)'s legislative history reveals Congress' concern with violence against persons, not property.

Initial drafts of this legislation contained no reference to burglary. *See* H.R. 4768, 99th Cong., 2d Sess. (1986); H.R. 4639, 99th Cong., 2d Sess. (1986) (identical companion bill to S. 2312, 99th Cong., 2d Sess. (1986)), *both versions reprinted in Armed Career Criminal Legislation: Hearing on H.R. 4768 Before the Subcomm. on Crime on the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 3-6 (1986) [hereinafter "*House Hearing*"]. Instead, these bills limited the predicate prior convictions for enhanced punishment to serious controlled-substance crimes and felonies that had as an element the use, attempted use, or threatened use of *physical force against a person*, H.R. 4768 § 2(b), or to "any felony which, by its nature, involves a *substantial risk that physical force against the person or property of another* may be used in the course of committing the offense." H.R. 4639 § b.

These two bills thus reflect widely differing approaches to the definition of the predicate offense, "violent felony," one limiting the predicate offense to crimes against the person, the other defining it much more broadly to include crimes with the potential for physical force against property. In compromising between these two approaches, Congress agreed to include certain property crimes, but *only when they involved risk of injury to a person.*

> The other major question involved in these hearings was as to what violent felonies involving physical force against *property* should be included in the definition of "violent" felony. The subcommittee agreed to add the crimes punishable for a term exceeding one year that involved conduct that presents a serious potential risk of physical injury to others. *This will add State and Federal crimes against property such as burglary,* arson, extortion, use of explosives and similar crimes as predicate offenses *where the conduct involved presents a serious risk of injury to a person.*

House Report at 3 (emphasis added). The above quotation is the source of the language now codified in § 924(e)(2)(B-)(ii), the violent felony definition which describes those convictions which may subject a defendant to punishment enhancement. From this Congressional finding it is very clear that *not all burglaries are necessarily predicate offenses*. Only when the burglary "presents a serious risk of injury to a person" did Congress intend for it to qualify as a predicate offense for punishment enhancement. *Id.*

Prior to passage of the Career Criminals Amendment Act of 1986, *supra*, Congress had provided for penalty enhancement in connection with the sentencing of repeat offenders on weapons charges. *See* Armed Career Criminal Act of 1984, part of Pub. L. No. 98-473, § 1802, 98 Stat. 1837, 2185, *codified at* 18 U.S.C. (Appendix) § 1202 (1982

& Supp. II 1984) (subsequently repealed by Firearms Owners' Protection Act, Pub. L. No. 99-308, §§ 102, 104, 100 Stat. 451-53, 456-59 (1986)). Under former § 1202, burglary was a predicate offense for punishment enhancement and was defined very broadly. It included any felony consisting of "entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." 18 U.S.C. (Appendix) § 1202(c)(9) (Supp. II 1984) (repealed).

When Congress repealed § 1202 with the Firearms Owners' Protection Act, *supra*, it briefly reinstated in substantial part § 1202's broad definition of burglary into 18 U.S.C. § 924(e). *See* Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a), 100 Stat. 456, 458 (1986). About five months after passage of the Firearms Owners' Protection Act, Congress replaced that definition with the provision at issue in this case. *See* Career Criminal Amendments Act of 1986, Pub. L. No. 99-570, §§ 1401-02, 100 Stat. 3207, 3207-39 to 3207-40 (1986). The federal courts of appeal have observed that the former statutory definition of burglary contained in § 1202(c)(9), and briefly in § 924(e), encompassed practically all offenses termed "burglary" in any state. *See United States* v. *Hill*, 863 F.2d 1575, 1578-79 (11th Cir. 1989). *See also* J.A. 39-40 (quoting *United States* v. *Headspeth*, 852 F.2d 753, 757 (4th Cir. 1988)).

The deletion of the former, broad definition of burglary from the statutory provision at issue is very significant. "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983). Because Congress specifically eliminated the former, broad definition

of burglary from § 924(e) when it passed the Career Criminal Amendments Act of 1986, that former definition was not intended to control. *Id.*

It is equally significant that the rejected language proposed by Senator Specter in S.2312 and the companion House Bill, H.R. 4639, which would have included all burglaries as predicate offenses, survives in the same section of the code. *See* 18 U.S.C. § 924(c)(3) ("crime of violence" includes use of "physical force against property of another"). *Cf.* H.R. 4639 *reprinted in House Hearing* at 4 ("violent felony" includes use of "physical force against property of another"). "'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in disparate inclusion or exclusion.'" *I.N.S.* v. *Cardoza Fonseca*, 480 U.S. 421, 432, 107 S. Ct. 1207, 1213 (1987) (quoting *Russello* v. *United States*, 464 U.S. at 23).

In passing the Career Criminal Amendments Act, Congress was refining the sentence enhancement provision with a change in emphasis from robbery and burglary to "serious drug offense[s]" and "violent felon[ies]," like kidnapping, murder and rape. Although Congress sought to enlarge the overall scope of the penalty enhancement provision, it only intended to include as predicate offenses those crimes which carried a serious risk of physical injury to others. *See House Hearing* at 26 (comments of Rep. Hughes, Sponsor of H.R. 4768, Chmn. of Subcomm. Hearing, and Author of *House Report*) ("not inadvertent that we left it [burglary] out"); *House Report* at 3 ("will add . . . burglary . . . where the conduct involved presents a serious risk of injury to a person"); *id.* at 4, 5.

In short, the Congressional history refutes the Eighth Circuit majority's conclusion that *any* conviction denominated a burglary constitutes a predicate offense for enhanced punishment. This Court should construe the statute so as to effect Congress' expressed intent: to include as predicate offenses only those burglaries which carry a serious risk of physical injury to non-participants.

III. The Eighth Circuit's Overbroad Interpretation Of The Word "Burglary" In Section 924(e)(2)(B)(ii) Improperly Leads To The Inclusion Of Offenses Which Do Not Necessarily Present A Serious Potential Risk of Physical Injury To Others As Punishment Enhancing "Violent Felon[ies]."

The Eighth Circuit panel majority concluded "that 'burglary' in the sentence enhancement statute means 'burglary' however a state chooses to define it." J.A. 36. This rule, if accepted, would include as predicate offenses many property crimes that are clearly non-violent and do not present a "serious potential risk of physical injury to another." *See* 18 U.S.C. § 924(e)(2)(B)(ii). *See also United States* v. *Leonard*, 868 F.2d 1393, 1395 (5th Cir. 1989) (Fifth Circuit applies same test as Eighth Circuit) (burglary is "violent felony" for enhancement purposes "without regard to whether the underlying conduct involved actual or potential violence").

Numerous crimes labeled "burglary" by one state or another have no potential risk of physical injury to another. *See, e.g.*, Mo. Rev. Stat. § 569.170 (1986) (burglary second degrees includes unarmed entry or remaining surreptitiously in unoccupied structure)[6]; Fla. Stat. Ann. § 810.02(3) (West Supp. 1989) (burglary third

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[6] The Missouri second degree burglary statute is nearly identical to the definition of burglary in the predecessor statutes to § 924(e), which definition was *deleted* from present § 924(e) by Congress. *Compare* Mo. Rev. Stat. § 569.170 (1986) *with* 18 U.S.C. (Appendix) § 1202(c)(9) (Supp. II 1984) (repealed).

degrees is unarmed entry or remaining in unoccupied conveyance or structure that is not a dwelling). The Florida statute expressly requires that such conduct be charged as third degree burglary and that other potentially violent conduct be charged as higher degree of burglary. Fla. Stat. Ann. § 810.02(3) (after defining potentially violent conduct as higher degrees of burglary, provides "otherwise, burglary is a felony of the third degree. . .").

Other states also include unarmed entry into unoccupied buildings and structures as burglary, while also prohibiting conduct that may present a risk of physical injury to others. For instance, California's burglary statute provides:

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, . . . [or] vehicle as defined by the Vehicle Code when the doors are locked . . . with intent to commit grand or petit larceny or any felony is guilty of burglary.

Cal. Penal Code § 459 (West 1988). Under that statute, such non-violent crimes as the unarmed burglary of an unoccupied auto and shoplifting are deemed "burglary." *See United States* v. *Chatman*, 869 F.2d 525, 528-29 (9th Cir. 1989) (entry through unsecured window of automobile without force is burglary) (citing *People* v. *Malcolm*, 47 Cal. App. 3d 217, 120 Cal. Rptr. 667 (1975)); *People* v. *Wilson*, 160 Cal. App. 2d 606, 325 P.2d 106 (1958) (burglary is entry of store when open to public with intent to commit theft [*i.e.*, shoplifting]), *cited in Chatman*, 869 F.2d at 529 n.2. The California statute, however, by its terms includes within its scope conduct that is potentially violent, such as the entry, armed or unarmed, into an occupied structure. *See, e.g., People* v. *Nunez*, 7 Cal. App. 3d 655, 662, 86 Cal. Rptr. 707, 712 (1970).

Likewise, one of Missouri's former statutes for burglary in the second degree would allow conviction for breaking and entering a building containing goods or other valuable things with the intent to steal. Mo. Rev. Stat. § 560.070 (1969) (repealed 1979). *See State* v. *Thomas*, 360 S.W.2d 694, 696-97 (Mo. 1962) (indictment alleging breaking and entering with intent to steal was insufficient for failing to allege presence of goods or other merchandise in building). The former Missouri statute, like the California statute, includes a broad range of conduct within its scope, including that which is potentially violent:

> *Burglary involving breaking and entering enclosures besides dwelling places.* Every person who shall be convicted of breaking and entering any building, the breaking and entering of which shall not be declared by any statute of this state to be burglary in the first degree, or any booth or tent, or any boat or vessel, or railroad car in which there shall be at the time *any human being or any goods, wares, merchandise or other valuable thing kept or deposited*, with the intent to steal or commit any crime therein, shall, on conviction, be adjudged guilty of burglary in the second degree.

Mo. Rev. Stat. § 560.070 (1969) (repealed 1979) (emphasis added). Thus, the defective indictment in *State* v. *Thomas* could also have been cured by alleging the presence of a person in the building. 360 S.W.2d at 697.

Although the California statute, the repealed Missouri statute and others like them would include burglaries of occupied buildings and thus have the potential for violence to another person, these statutes nevertheless allow conviction for offenses such as shoplifting, breaking into a pay telephone, and the burglary of unoccupied buildings, none of which pose a serious risk of physical injury to

another. *See, e.g., United States* v. *Leonard*, 868 F.2d 1393, 1395 & n.2 (5th Cir. 1989) (enhancement possible based upon burglary of coin-operated machine or vehicle). Such "non-violent" burglaries will be classified as "violent felonies" under the Eighth Circuit's test.

The panel majority's holding raises serious constitutional concerns. Application of the majority's opinion reaches the anomalous result that when conduct which is labeled a burglary in Missouri takes place in states which label such conduct as something else, *i.e.*, "breaking and entering" or "storehouse breaking," that identical conduct will not be subject to punishment enhancement under § 924(e) merely because of where it took place. *See, e.g.*, Ark. Crim. Code. Ann. § 5-39-202 (1987) (conduct labeled breaking and entering); Md. Crim. L. Code Ann. § 31B (1986) (conduct labeled breaking and entering storehouse), *cited in United States* v. *Headspeth*, 852 F.2d 753, 756 (4th Cir. 1988). Although many states, *e.g.*, Florida and Missouri, differentiate between "violent" and "non-violent" burglaries by assigning lesser degrees to less offensive conduct, others differentiate less clearly. *See supra* at 20. Thus, under the panel majority's decision, sentence disparity would arise based solely on the variation in the title of the offenses in different states. This Court should reject a test that leads to such unintended, unwise and presumably unconstitutional results.

The Government has acknowledged this flaw in the Eighth Circuit's position. In opposing certiorari in the case at bar the Solicitor General, while not confessing error, stated his disagreement with the panel majority's holding "that 'burglary' in the sentence enhancement statute means 'burglary' however a state chooses to define it," J.A. 36. *See* Brief for the United States in Opposition to Certiorari at 13-14, *Taylor* v. *United States*, No.

88-7194, *cert. granted*, 110 S. Ct. 231 (Oct. 10, 1989) [hereinafter "Brief in Opposition to Certiorari"]. Thus, both parties herein disagree with the test employed by the Eighth Circuit—the most expansive interpretation among the circuits. *See* Brief in Opposition to Certiorari at 14. As set forth *infra*, the definition of "burglary" advocated by the Government and accepted by several other circuit courts to construe the meaning of the predicate offense "violent felony" is also seriously flawed, thus necessitating reversal.

IV. The Correct Test For Whether A Particular Crime Is A "Violent Felony" Predicate Offense For Sentence Enhancement Under 18 U.S.C. § 924(e)(2)(B)(ii) Is Whether Any Element Of That Offense *Necessary For Conviction* Requires "Conduct That Presents A Serious Potential Risk Of Physical Injury To Another."

A. Both The Statutory Language Of § 924(e)(2)(B) And Expressed Congressional Intent Establish That The Determination Of Whether A Given Conviction Constitutes A "Violent Felony" Should Not Require A Fact-Based Inquiry, But Instead A Determination Based Upon The Underlying Elements Of The Offense.

Although the Eighth Circuit's test is overbroad, as conceded by the Solicitor General, it is a tacit recognition that the statutory definition of violent felony requires a categorical approach, rather than a test necessitating examination of the underlying facts of purported predicate offenses. To the extent that the Eighth Circuit employed such a categorical standard to determine whether a crime constitutes a predicate offense, its approach is consistent with the statutory "violent felony" definition and the analyses of the other circuits, as discussed below.

The categorical and elemental framework of § 924(e)(2)(B) established a uniform federal standard for

the selection of predicate offense violent felonies based upon the underlying element or category of conviction. 18 U.S.C. § 924(e)(2)(B) (subdivision (i) based upon elements, and subdivision (ii) based upon categorization of the underlying conviction). This approach eliminates the need to examine specific underlying conduct on a case-by-case basis (as opposed to merely examining the elements of the underlying state conviction).

Subdivision (i) indisputably takes this approach, including as predicate offenses crimes punishable by more than a year in prison that have "as an *element*" the "use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). Subdivision (ii) establishes as predicate offenses, first, specific categories of crimes, and, second, crimes that "otherwise" involve conduct which presents a serious risk of potential physical injury to another. 18 U.S.C. § 924(e)(2)(B)(ii). The specific enumeration of offenses, in combination with the use of the "or *otherwise* involves conduct" language, represents a categorical approach that selects as predicate offenses those crimes that present a risk of physical injury to others. *See United States* v. *Sherbondy*, 865 F.2d 996, 1005-10 (9th Cir. 1988); *United States* v. *Vidaure*, 861 F.2d 1337, 1341 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1551 (1989); *United States* v. *Headspeth*, 852 F.2d 753, 758-59 (4th Cir. 1988) (all holding that such a categorical approach follows from the language of subdivision (ii)).

The Solicitor General also advocates a categorical approach, urging that "burglary" in subdivision (ii) should be governed by categorical analysis of the underlying offense, albeit through reference to elements of the previous, deleted statutory definition in § 1202(c)(9) and former § 924(e). *See* Brief in Opposition to Certiorari at 11. "The government argues that the trial court need only

consider such offenses in their generic sense, without looking to the underlying conduct to determine whether it involved the risk of violence." *United States* v. *Leonard*, 868 F.2d 1393, 1395 (5th Cir. 1989).

The legislative history of § 924(e)(2)(B) suggests the appropriateness of a categorical approach. Both bills from which subdivision (ii) developed defined the predicate offense by reference to the "nature" or "element" of the offense under state law. *Cf.* H.R. 4768, 99th Cong., 2d Sess. (1986); H.R. 4639, 99th Cong., 2d Sess. (1986). The House Report describes subdivision (ii) categorically: "State and Federal felonies against property that present a serious potential risk of physical injury to a person." *House Report* at 4.

Moreover, this Court has previously construed the predecessor statute, from which this statute grew, as a matter of federal law even though the underlying predicate offense is a creature of state law. *Dickerson* v. *Banner Institute, Inc.*, 460 U.S. 103, 111-12 (1983). "This makes for desirable national uniformity unaffected by varying state laws, procedures, and definitions of 'conviction.'" *Id.* at 112. Similarly, application of a federal, elemental standard to the predicate offense terms in subdivision (ii) of the current statute would ensure uniformity, notwithstanding the varying state law roots of the underlying convictions. Such a result is consistent with the well-established rule of construction that this Court employed in *United States* v. *Turley:* "[I]n the absence of a plain indication of an intent to incorporate diverse state law into a federal criminal statute, the meaning of the federal statute should not be dependent on state law." 352 U.S. 407, 411 (1957). *See Sherbondy*, 865 F.2d at 1005 (rejecting state law as controlling § 924(e)'s definition of "violent felony").

Further support for a uniform, federal standard in this case arises from past use of that approach in similar situations, as the dissent in *Banner Institute* noted. *See* 460 U.S. at 123-24 (Rehnquist, J., dissenting). Other similar provisions in federal statutes are an appropriate reference for determining the meaning of the disputed term in federal statutory interpretation cases. *Id.* Federal definitions of terms similar to "violent felony" exist as a reference for comparison. Several statutes refer to "crime of violence" and define the term categorically based on the elements of an underlying offense. *See, e.g.*, 18 U.S.C. §§ 16, 924(c)(3), and 3156(a)(4). These statutes are significant in how they define "crime of violence;" their broader substantive definition is not significant because it was presented to Congress and rejected in H.R. 4639.

Finally, considerations of policy support this construction. If status as a predicate offense depends upon the actual facts of the underlying conduct (as opposed to the elements of the offense), courts will be deluged with mini-trials seeking to examine conduct which may be long past. This case demonstrates the difficulties inherent in attempting to ascertain the specific conduct underlying old convictions. Petitioner's burglary convictions were from 1971 and 1963. J.A. 6, 18. It is known that these convictions were for burglary second degree, but it is not known under which specific statutes defendant was convicted. *See infra* pp. 33-34. Witnesses may no longer be available or even alive, and if they can be located, the passing years render their memory inherently unreliable. Evidence may have been destroyed or lost, such as the police files of the 1963 burglary conviction referenced in paragraph one of the Government's Notice of Punishment Enhancement, J.A. 6, which could not even be located. J.A. 11. If the convictions occurred in different states, as

petitioner's did, J.A. 6-7, the difficulties are magnified by the complications of distance.

In summary, a categorical, elemental approach to determine what convictions satisfy § 924(e)'s definition of "violent felony" is supported by the statutory language which classifies crimes by element in subdivision (i) and by category in subdivision (ii). The previous interpretations of similar federal terms, *e.g.*, "crime of violence," have employed such an approach, as has every court of appeals interpreting this specific subdivision. Whether the approach be the Eighth and Fifth Circuit's "name of the offense" categorization, J.A. 36; *United States* v. *Leonard*, 868 F.2d at 1395; the Third, Sixth, Seventh and Eleventh Circuit's reference to former § 1202(c)(9)'s definition of burglary, *e.g.*, *United States* v. *Hill*, 863 F.2d at 1581-82; the Fourth and Ninth Circuit's reference to the elements at common law, *e.g.*, *United States* v. *Sherbondy*, 865 F.2d at 996; or the First Circuit's case-by-case evaluation of the elements underlying the conviction sought to be used as a predicate offense, *e.g.*, *United States* v. *Patterson*, 882 F.2d 595, 604 (1st Cir. 1989)[7]; a tacit consensus exists that the preferred approach for determining whether a conviction is a predicate offense should be based on its elements, not the underlying conduct. As discussed below, the only remaining issue is how to define the test in a way that circumscribes the violent elements of burglary for enhancement purposes, so that Congress' intent is effectuated: a test that will ensure that

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[7] Insofar as *Patterson* holds that an element of "felonious breaking and entering presents 'a serious potential risk of physical injury to another,'" 882 F.2d at 604, petitioner submits that *Patterson* was wrongly decided: its holding condemns as predicate offenses those burglaries which do not involve conduct that presents a serious risk of physical injury to another. *See infra*, pp. 28-30.

convictions for burglaries that do not present a serious risk of potential injury to another are not included as predicate offenses.

B. For Purposes Of Sentence Enhancement Under § 924(e)(2)(B), Burglary Should Be Defined As Any Crime Punishable By A Term Of Imprisonment Exceeding One Year And Consisting Of Entering Or Remaining Within A Building That Is Property Of Another With Intent To Engage In A Federal Or State Offense *That Involves As An Element Necessary For Conviction Conduct That Presents A Serious Potential Risk Of Physical Injury To Another.*

As set forth *supra* at 15-19, the expressed intent of Congress is to include as predicate offenses those burglaries which involve conduct that presents a serious potential risk of physical injury to another. Further, we have argued that whether a particular state conviction is a "violent felony" is a matter of federal law to be applied uniformly through the evaluation of state convictions based upon their elements. *See supra* at 23-28. Specifically applied to burglary as a predicate offense, Congress therefore intended that courts examine an underlying state conviction to determine whether an element of the crime necessary for conviction includes "conduct that presents a serious potential risk of physical injury to another."

According to the Government, the proper definition of "burglary" is the repealed, former definition of burglary from "the original version of Section 924(e)." Brief In Opposition To Certiorari at 11. That definition provided that burglary was:

> any crime punishable by a term of imprisonment exceeding one year and consisting of entering or remaining within a building that is property of another with intent to engage in conduct constituting a Federal or State offense.

Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a), 100 Stat. 456, 458-59 (1986) (essentially reincorporating former § 1202(c)(9) with minor changes into § 924 (e)).

This definition broadly encompasses nearly all forms of burglary, including those which present a serious potential risk of physical injury to another and those that do not. The legislative history contains no specific indication of why this particular provision was repealed, nor any criticism of its operation or effectiveness. Implicit in the Congressional debate about what property offenses to include as predicate offenses, however, is that the definition was overbroad, due to its inclusion of "non-violent" burglaries. As the only definition from the former enhancement statute that applied to crimes against property, former § 924(e) may nonetheless supply a starting point from which to draft a definition of "burglary." In order to effectuate Congressional intent, this Court should modify the prior definition by eliminating as predicate offenses those crimes which do not involve a serious potential risk of physical injury to another.

Petitioner suggests that this Court adopt the following definition for burglary as that term is used in 18 U.S.C. § 924(e)(2)(B)(ii):

> Burglary is any crime punishable by a term of imprisonment exceeding one year and consisting of entering or remaining within a building that is the property of another with intent to engage in conduct constituting a Federal or State offense that has as an element necessary for conviction conduct that presents a serious risk of physical injury to another.

This definition, while employing language from repealed Section 924(e), effectuates Congressional intent by eliminating "non-violent" burglaries as predicate offenses.[8]

Petitioner further suggests that conduct which presents a "serious potential risk of physical injury to another" occurs when a burglar: (1) enters or remains in an occupied building; (2) is armed with a deadly weapon or explosives; (3) causes or threatens immediate physical

[8] Despite the presumption that Congress intends the common law meaning when it uses without definition terms like "burglary" which have an established common law meaning, *United States* v. *Turley*, 352 U.S. 407, 411 (1957), petitioner doubts that Congress intended the common law meaning of burglary to control the definition of "violent felony" in the enhancement statute. *But see United States* v. *Chatman*, 869 F.2d 525, 529-30 (9th Cir. 1989); *United States* v. *Headspeth*, 852 F.2d 753, 758 (4th Cir. 1988). The definition is so anachronistic that only 5 of the 36 states surveyed in *United States* v. *Hill* retain it. 863 F.2d 1575, 1582 & n.5 (11th Cir. 1989). Thus, application of the common law definition would result in two alternative consequences, neither of which seem likely to comport with Congressional intent or advisable as a matter of policy. One of those consequences would be to require "mini-trials" in the vast majority of states that do not retain the common law definition as a specific offense. The sentencing court in those states would have to examine the underlying conduct, beyond the elements of the conviction itself, in order to ascertain whether the facts of a particular offense fit the restrictive common law definition. Even under the more manageable alternative, *i.e.*, examining whether the statute upon which a prior conviction was based necessarily includes all of the elements of common law burglary, the result would be effectively to read the word "burglary" out of the statutory definition of "violent felony." Most states do not have common law burglary as a separate offense, so they probably will not have as elements to be proved for conviction proof that the offense occurred at night and in a dwelling.

However, and as noted at n. 9 below, use of the common law definition is preferable to that employed by the Eighth Circuit and to the standard urged by the Government.

injury to anyone who is not a participant in the crime; and/or (4) flees upon investigation by any person.

Similarly, for the reasons stated above, the catchall clause of § 924(e)(2)(B)(ii) (". . . or otherwise involves conduct that presents a serious potential risk of physical injury to another") should be construed so as to include only those crimes which include such risks as an element of the offense.

C. The Possibility That Some Burglary Convictions Involving Conduct That Presents A Serious Risk Of Physical Injury To Another Will Not Qualify As Enhancement Offenses Under Petitioner's Proposed Test Is Outweighed By The More Fundamental Concern That Alternative Tests Will Result In the Drastic Sentence Enhancement Of Persons Not Intended By Congress To Be Subject To Enhancement.

Burglary statutes fall into three categories: those that necessarily involve an element that presents a serious potential risk of violence to another person, those that do not, and those that *may but do not necessarily* involve an element that presents such a risk. *Compare* Fla. Stat. Ann § 810.02 (defining first degree burglary with elements that involve serious potential risk of injury to others; second degree burglary with mixed elements; and third degree burglary without such elements); Cal. Penal Code §§ 459, 460 (burglary second degree involves conduct ranging from shoplifting to armed burglary of occupied structure and is defined with same elements); *and* Mo. Rev. Stat. § 560.070 (1969) (repealed 1979) (defining second degree burglary as entry in building with intent to steal when there is present either (1) "any human" (potential risk of injury to another), or (2) "any goods . . . or other valuable thing" (no potential for physical risk to another)). *See* pp. 19-22, *supra*.

Petitioner recognizes that his suggested definition may have the effect of disqualifying convictions arising under the third category of burglary statutes noted above (*i.e.*, those which may involve either or both potentially violent and non-violent conduct) from use for purposes of enhancement. This is because such statutes do not necessarily have as an element necessary for conviction conduct that presents a serious potential risk of physical injury to another. We also anticipate that the Government will argue that this will result in individuals engaging in potentially violent conduct being excused under Federal law from the ordinary consequences of their conduct, merely because their crime arose in a state having a "third category" statute.

As a practical matter, however, in many instances it is impossible to determine whether convictions arising under such statutes in fact involve the requisite risk of physical injury to others. In cases tried under these statutes, it will frequently be unclear whether a jury's verdict of guilt was based on potentially violent conduct, potentially non-violent conduct, or both. Was the defendant armed when he engaged in shoplifting? If he broke into a bank (former Mo. Rev. Stat. § 560.075 (1969) (repealed)) did he use explosives to gain entry (former Mo. Rev. Stat. § 560.100)? A mere verdict of guilt, absent seldom-used devices like special interrogatories, will not answer these potentially dispositive questions.

In any event, the possibility that potentially violent actors will not be fully punished is far outweighed by the *certainty* that many "non-violent" burglars *will* face drastic enhancement under either the Government's suggested test or the definition employed by the Eighth Circuit below. This result—which unquestionably is at odds with the subject statutory language, "violent felony"

—offends principles of due process. "A penal statute must define the criminal offense . . . in a manner that does not encourage arbitrary and discriminatory enforcement." *United States* v. *Chatman*, 869 F.2d 525, 527 (9th Cir. 1989), *quoting Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). The Government's suggested test, however, is overbroad in favor of the Government and therefore violates the axiom that penal statutes are to be strictly and narrowly construed in favor of the defendant. *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 285 (1978). Moreover, since these "third category" statutes are undeniably overbroad, at least for purposes of enhancing federal firearm possession sentences, the rule of lenity mandates that § 924(e) be construed so as to limit their applicability. *See generally Bifulco* v. *United States*, 447 U.S. 386, 387 (1980).[9]

V. Petitioner's Convictions For Burglary Second Degree Are Not Predicate Offenses For Sentence Enhancement Under 18 U.S.C. § 924(e)(2)(B)(ii) Because The Government Has Not Demonstrated That The Pertinent Burglary Statutes Have An Element Necessary For Conviction That Involves A Serious Potential Risk Of Physical Injury To Another.

Petitioner was convicted in 1963 and 1971 of burglary second degree under Missouri law. Notice of Punishment

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[9] Even if this Court chooses not to accept petitioner's proffered definition, for fear that some "violent" burglaries will slip through the cracks, neither of the standards advocated by the Government and the Eighth Circuit, respectively, should be used in its stead. Considerations of fundamental fairness and process, as well as the rule of lenity, would mandate either that (1) the Court adopt the definition of common law burglary or (2) factual inquiry be made on a case-by-case basis into would-be predicate offenses in order to ensure that the requisite risk of violence existed. *See generally Liparota* v. *United States*, 471 U.S. 419, 427 (1985).

Enhancement ¶ ¶ 1-2, J.A. 6-7. The certified convictions obtained by the Government for these offenses fail to identify the specific statutory provision under which petitioner's convictions were obtained. J.A. 26, 30. At the times that petitioner was convicted, Missouri had seven separate statutory provisions that each identified a different form of burglary, depending on the type of structure that was involved, all of which were "burglary in the second degree."[10]

These provisions permitted conviction for conduct that may or may not have presented a serious risk of physical injury to another. Six of the burglary statutes did not distinguish between whether the burglarized structure was occupied or not, and did not address whether the perpetrator was armed. *See* n. 10, *supra*. The remaining statute has as an element of the offense the requirement that there not be any person in the building, and it, like the others, did not address whether or not the burglar was armed. Mo. Rev. Stat. § 560.080 (1969) (repealed 1979) ("Burglary—breaking and entering vacant building").

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[10] Mo. Rev. Stat. § 560.045 (1969) (repealed 1979) (Burglary of dwelling not in first degree); *id.* § 560.050 (Burglary involving breaking out of dwelling); *id.* § 560.055 (Burglary involving breaking inner door); *id.* § 560.060 (Burglary after being admitted with consent of occupant); *id.* § 560.070 (Burglary involving breaking and entering enclosures besides dwelling places); *id.* § 560.075 (Burglary involving bank buildings); *id.* § 560.080 (Burglary—breaking and entering vacant building).

All seven of these offenses vary according to the structure that is violated without considering whether the structure is occupied (except for *id.* § 560.080) and without considering whether the burglar is armed or engaged in any action that threatens others. They thus include within their scope both conduct that presents a serious potential risk for physical injury to others and conduct that does not.

None of the burglary second degree statutes in effect at the time of petitioner's conviction contained an element necessary for conviction that involved conduct presenting a serious risk of potential physical injury to another. None of petitioner's convictions for burglary second degree qualify as predicate offenses under the suggested test articulated above.

Therefore, petitioner has only two convictions that are predicate offenses. Notice of Punishment Enhancement ¶ ¶ 3-4, J.A. 7, 34 n.2. The district court thus erred in sentencing petitioner under § 924(e), and the Eighth Circuit erred in affirming the sentence. Accordingly, the court of appeals' judgment must be reversed and remanded for re-sentencing under 18 U.S.C. § 924(a)(1) (Supp. V 1987).

CONCLUSION

For the reasons stated herein, petitioner respectfully requests the Court to reverse the judgment of the United States Court of Appeals for the Eighth Circuit and remand the case for re-sentencing under the statute that provides a maximum term of imprisonment of five years with a chance for parole, 18 U.S.C. § 924(a)(1) (Supp. V 1987) (subsequently amended by 18 U.S.C.A. § 924(a)(1) (West Supp. 1989).

Respectfully submitted,

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APPENDIX

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18 U.S.C. § 924(a)(1) (Supp. V 1987) (Repealed) provides in pertinent part:

> (a)(1) Except as otherwise provided in paragraph (2) of this subsection, subsection (b) or (c) of this section, or in section 929, whoever—
>
> * * *
>
> (B) knowingly violates subsection (a)(4), (a)(6), (f), (g), (i), (j), or (k) of section 922:
>
> * * *
>
> shall be fined not more than $5,000, imprisoned not more than five years, or both, and shall become eligible for parole as the Parole Commission shall determine.

18 U.S.C. (Appendix) § 1202(c)(9) (Supp. II 1984) (Repealed) provides:

> (9) "burglary means any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense.

Fla. Stat. Ann. § 810.02 (West Supp. 1989) provides:

> (1) "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.
>
> (2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender:
>
> (a) Makes an assault or battery upon any person.
>
> (b) Is armed, or arms himself within such structure or conveyance, with explosives or a dangerous weapon.
>
> (3) If the offender does not make an assault or battery or is not armed, or does not arm himself, with a dangerous

weapon or explosive as aforesaid during the course of committing the offense and the structure or conveyance entered in a dwelling or there is a human being in the structure or conveyance at the time the offender entered or remained in the structure or conveyance, the burglary is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Otherwise, burglary is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Cal. Penal Code § 459 (West 1988) provides:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.

Cal. Penal Code § 460 (West 1988) provides:

1. Every burglary of an inhabited dwelling house or trailer coach as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree.

2. All other kinds of burglary are of the second degree.

3. This section shall not be construed to supersede or affect Section 464 of the Penal Code.

Mo. Rev. Stat. § 569.160 (1986) provides:

1. A person commits the crime of burglary in the first degree if he knowingly enters unlawfully or knowingly

remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein, and when in effecting entry or while in the building or inhabitable structure or in immediate flight therefrom, he or another participant in the crime:

(1) Is armed with explosives or a deadly weapon; or

(2) Causes or threatens immediate physical injury to any person who is not a participant in the crime; or

(3) There is present in the structure another person who is not a participant in the crime.

2. Burglary in the first degree is a class B felony.

Mo. Rev. Stat. § 569.170 (1986) provides:

1. A person commits the crime of burglary in the second degree when he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein.

2. Burglary in the second degree is a class C felony.

Mo. Rev. Stat. § 560.040 (1969) (Repealed) provides:

Every person who is convicted of breaking into and entering the dwelling house of another, in which there is at the time some human being, with intent to commit some felony or to steal therein, either: First, by forcibly bursting or breaking the wall or outer door, window or shutter of a window of such house or the lock or bolt of such door, or the fastening of such window or shutter; or, second, by breaking in any other manner, being armed with some dangerous weapon, or with the assistance and aid of one or more confederates, then actually present, aiding and assisting; or third, by unlocking an outer door by means of false keys, or by picking the lock thereof, shall be adjudged guilty of burglary in the first degree.

Mo. Rev. Stat § 560.045 (1969) (Repealed) provides:

Every person who is convicted of breaking into a dwelling house, with intent to commit a felony or to steal, but under such circumstances as do not constitute the offense of burglary in the first degree, shall be deemed guilty of burglary in the second degree.

Mo. Rev. Stat § 560.050 (1969) (Repealed) provides:

> Every person who enters into the dwelling house of another in such manner as not to constitute any burglary as hereinbefore specified, with intent to commit a felony or to steal, or, being in the dwelling house of another commits a felony or steals, and breaks any outer door, window, or shutter of a window, or any other part of said house to get out of the same, shall be adjudged guilty of burglary in the second degree.

Mo. Rev. Stat. § 560.055 (1969) (Repealed) provides:

> Every person, who having entered the dwelling house of another through an open outer door or window or other aperture not made by such person, breaks an inner door of the same house, with intent to commit any felony or to steal, shall be adjudged guilty of burglary in the second degree.

Mo. Rev. Stat. § 560.060 (1969) (Repealed) provides:

> Every person who, being admitted into any dwelling house, with the consent of the occupant thereof, or who, being lawfully in such house, breaks an inner door with intent to commit a felony or tc steal, shall be adjudged guilty of burglary in the second degree.

Mo. Rev. Stat. § 560.070 (1969) (Repealed) provides:

> Every person who shall be convicted of breaking and entering any building, the breaking and entering of which shall not be declared by any statute of this state to be burglary in the first degree, or any booth or tent, or any boat or vessel, or railroad car in which there shall be at the time any human being or any goods, wares, merchandise or other valuable thing kept or deposited, with the intent to steal or commit any crime therein, shall, on conviction, be adjudged guilty of burglary in the second degree.

Mo. Rev. Stat. § 560.075 (1969) (Repealed) provides:

> Every person who shall break and enter into any banking house or bank building in which there shall be at the time any money, notes, checks, goods, wares, merchandise or other valuable things kept or deposited, with intent

> to steal, or commit any felony therein, shall, on conviction, be adjudged guilty of burglary in the second degree.

Mo. Rev. Stat. § 560.080 (1969) (Repealed) provides:

> Every person who shall be convicted of breaking and entering any vacant building, in which there shall be no human being, and in which there shall be no goods, wares, merchandise, or other valuable thing kept, and shall take or attempt to take or tear or remove from its place in said building, any lead pipe, brass or copper, or any other valuable thing attached to or being a part of said building with intent to steal or to commit any felony therein, shall, upon conviction, be adjudged guilty of burglary in the second degree.

Mo. Rev. Stat. § 560.100 (1969) (Repealed) provides:

> A person who, with intent to commit some crime, breaks and enters any building in the nighttime, and, for the purpose of committing any crime, uses or attempts to use nitroglycerine, dynamite, gunpowder or any other high explosives, is guilty of burglary with explosives.

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No. 88-7194

In the Supreme Court of the United States

OCTOBER TERM, 1989

ARTHUR LAJUANE TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Missouri offense of second degree burglary is a "violent felony" under the sentence enhancement provision of 18 U.S.C. 924(e).

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 33-45) is reported at 864 F.2d 625.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1989. A petition for rehearing was denied on March 7, 1989. J.A. 46. The petition for a writ of certiorari was filed on May 6, 1989, and granted on October 10, 1989. J.A. 47. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 922(g), provides in pertinent part:

It shall be unlawful for any person—

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

* * * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The 1986 version of 18 U.S.C. 924 (1982 & Supp. V 1987),[1] provides in pertinent part:

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years * * *.

(2) As used in this section—

* * * * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year that—

[1] The 1986 version of Section 924 applies to petitioner's offense. Congress has since amended 18 U.S.C. 924(e)(1) in a manner not material to this case. In the Minor and Technical Criminal Law Amendments Act of 1988, Pub. L. No. 100-690, § 7056, 102 Stat. 4402, Congress amended Section 924(e)(1) to provide that the enhanced sentence applies to otherwise qualified felons who have "three previous convictions * * * [for offenses] committed on occasions different from one another."

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

STATEMENT

1. Petitioner was indicted in the Eastern District of Missouri on three counts of possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. 922(g)(1). J.A. 2-5. In the district court, the government filed a pretrial "Notice of Punishment Enhancement," which stated that since petitioner's criminal record included two previous convictions for second degree burglary under Missouri law,[2] one previous state conviction for robbery, and

[2] In September 1963 and in October 1971, petitioner was convicted of second degree burglary in the Missouri state courts. See J.A. 26-27, 30-31. At the time he committed those crimes, second degree burglary in Missouri consisted of several distinct offenses, but generally involved unlawful entry into a building with the intent to commit a crime. See Mo. Rev. Stat. §§ 560.045, 560.050, 560.055, 560.060, 560.070, 560.075, 560.080 (1969) (repealed 1979), *reprinted at* Appendix to Pet. Br. 3a-5a. Petitioner conceded that his two convictions involved entries into buildings. The first was a burglary of a service station at night when the station was closed; the second was an entry into, and theft of items from, the home of a girlfriend of petititioner's accomplice. J.A. 11. See also Pet. Br. 6-7 n.1.

In 1979, Missouri repealed the separate definitions of second degree burglary. Missouri law currently defines that offense as "knowingly enter[ing] unlawfully or knowingly remain[ing] unlawfully in a building or inhabitable structure for the purpose of committing a crime therein." Mo. Rev. Stat. § 569.170 (1986), *reprinted at* Pet. Br. App. 3a.

two previous state convictions for assault, he was subject to an enhanced sentence under 18 U.S.C. 924 (e)(1) (Supp. V 1987). J.A. 6-7.

Petitioner pleaded guilty to one of the three counts in the indictment. At the sentencing hearing, petitioner contended that his burglary convictions were not proper predicate offenses under Section 924(e)(1), because those crimes did not involve actual or potential injury to others. J.A. 8-12, 19.[3] The district court rejected that argument and sentenced petitioner to an enhanced term of 15 years' imprisonment under Section 924(e)(1). J.A. 13-21, 22-25.

2. The court of appeals affirmed. J.A. 33-45. In the court of appeals, petitioner argued that Section 924(e) did not apply to his burglary convictions because those offenses did not involve a serious potential risk of physical injury to another. Relying on its recent decision in *United States* v. *Portwood*, 857 F.2d 1221 (8th Cir. 1988), cert. denied, 109 S. Ct. 2073 (1989), the court of appeals held that Congress's use of the term "burglary" in Section 924(e)(2)(B)(ii) means " 'burglary' however a state chooses to define it." J.A. 36. As the court explained, "[a] person with . . . prior convictions for burglary, regardless of the details of each burglary, presents

[3] At the sentencing hearing, the government agreed with petitioner that the district court should not consider one of the two assault convictions in applying the enhancement provision since that conviction had not been verified. J.A. 14, 17-18. Petitioner did not challenge the characterization of his remaining assault and robbery convictions as "violent felonies." See 18 U.S.C. 924(e)(2)(B)(i); J.A. 8-9, 18-19. Petitioner is therefore subject to an enhanced sentence if either one of his second-degree burglary convictions qualifies as a conviction for "burglary" within the meaning of Section 924(e)(2)(B)(ii).

the type of potential threat to society that Congress sought to control by the enactment of § 924(e)." J.A. 36 (quoting *Portwood*, 857 F.2d at 1224). Consequently, the court held, "Congress could quite reasonably conclude that no matter what the felon's intent upon breaking in, the property owner may return, a neighbor may investigate, or a law enforcement official may respond. All of these scenarios present a grave threat of harm to persons." J.A. 36 (quoting *Portwood*, 857 F.2d at 1224).

Judge Bright dissented. J.A. 36-45. In his view, since Congress did not define the term "burglary" in Section 924(e), it must have intended to adopt the common law definition, *i.e.*, "the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." J.A. 37. Since Judge Bright found that petitioner's burglary convictions did not fall within this common law definition and did not otherwise "involve[] conduct that presents a serious potential risk of physical injury to another" (18 U.S.C. 924(e)(2)(B)(ii) (Supp. V 1987)), he concluded that petitioner should not have been subjected to the enhancement provision of Section 924(e). J.A. 43-45.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Armed Career Criminal Act of 1984 established an enhanced penalty for anyone who illegally possessed a firearm and had three previous convictions for robbery or burglary. Pub. L. No. 98-473, Title II, §§ 1801-1803, 98 Stat. 2185, codified at 18 U.S.C. App. 1202 (1982 & Supp. II 1984). The terms "burglary" and "robbery" were specifically defined in the statute. The definitions that Congress

adopted were the generic definitions of those crimes —the definitions used by an overwhelming majority of modern jurisdictions. "Burglary" was defined in the statute as a "felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense."

In 1986, Congress expanded the category of predicate crimes that would result in enhanced penalties for firearms offenses. With the enactment of the Career Criminals Amendment Act of 1986, Congress provided enhanced penalties for any firearms offender with three previous convictions of a "serious drug offense" or a "violent felony." Pub. L. No. 99-570, §§ 1401-1402, 100 Stat. 3207-39 to 3207-40, codified at 18 U.S.C. 924(e) (Supp. V 1987). The term "violent felony" was defined to include (i) any felony that has as an element the use or threat of use of force against another, and (ii) burglary, arson, extortion, crimes involving the use of explosives, or any other felony involving conduct that presents a serious potential risk of physical injury to another. Unlike the 1984 statute, the 1986 statute did not define the term "burglary." The definition in the 1984 statute was omitted from the 1986 amendment, apparently as a result of inadvertence.

Congress's unexplained failure to define burglary in the 1986 statute has resulted in confusion. Under the 1984 Act, petitioner clearly would have been subject to an enhanced sentence, since his two burglaries fell within the express definition of burglary in that statute. Because of the absence of a separate definition of burglary in the 1986 Act, however, the courts have had difficulty determining whether burglaries such as petitioner's are covered by that statute.

In this case, the Eighth Circuit held that a prior state court conviction is a conviction for "burglary" within the meaning of Section 924(e) if the State calls the offense burglary, but not otherwise. The Fifth Circuit has adopted the same view. See, *e.g.*, *United States* v. *Leonard*, 868 F.2d 1393 (5th Cir. 1989), cert. pending, No. 88-1885. Thus, the court of appeals held that because petitioner's Missouri offenses were labeled as burglaries under Missouri law, they constituted burglaries for purposes of Section 924(e)(2)(B)(ii).

The Fourth and Ninth Circuits have taken a much narrower approach. Those two courts have concluded that because Congress failed to define the term "burglary" in the 1986 statute, that term must be construed to include only those crimes that would have been considered burglaries at common law, *i.e.*, the breaking and entering of a dwelling at night with the intent to commit a felony within. See, *e.g.*, *United States* v. *Headspeth*, 852 F.2d 753 (4th Cir. 1988); *United States* v. *Chatman*, 869 F.2d 525 (9th Cir. 1989).

The Third, Sixth, Seventh, and Eleventh Circuits have taken a third view—the one we believe is correct. Those courts have held that the modern, generic definition of burglary, which was contained in the 1984 Act, should also be applied to prosecutions under the 1986 version of the statute. See, *e.g.*, *United States* v. *Palmer*, 871 F.2d 1202 (3d Cir.), cert. denied, 110 S. Ct. 233 (1989); *United States* v. *Taylor*, 882 F.2d 1018 (6th Cir. 1989), cert. pending, No. 89-5962; *United States* v. *Dombrowski*, 877 F.2d 520 (7th Cir. 1989), cert. pending, No. 89-5282; *United States* v. *Hill*, 863 F.2d 1575 (11th Cir. 1989). Because Congress intended to extend the Armed Career

Criminal Act's coverage, and not in any way to restrict its application, those courts have held that any conduct that would have constituted burglary under the 1984 statute still constitutes burglary under the Act as amended.[4]

1. For two reasons, the modern definition of burglary, which Congress expressly incorporated in the 1984 statute, is the proper definition of the term "burglary" in the 1986 statute. First, when Congress employs a term without defining it, it is assumed that Congress intends the term to have its ordinary contemporary meaning. Only five States still embrace the narrow common law definition of burglary. The common law definition has been almost entirely replaced by modern statutes, which define burglary, with only minor variations, as the entry (in day or night) of a building (whether a dwelling or otherwise) with intent to commit a crime (not necessarily a felony). Forty-one of the 50 States have adopted this generic definition of the term, and Congress itself has used that definition in several modern statutes. Absent some indication to the contrary, it is unreasonable to attribute to Congress an intent to adopt the arcane common law definition of burglary rather than the prevailing modern definition.

[4] The First Circuit has declined to adopt any of those competing constructions. See *United States* v. *Patterson*, 882 F.2d 595 (1st Cir. 1989), cert. pending, No. 89-5881. Having determined that it "frankly cannot divine how Congress intended to define burglary" in the 1986 version of the Armed Career Criminal Act, the First Circuit refused to hold that a defendant's convictions for "breaking and entering" under Massachusetts law constituted "burglary" within the meaning of Section 924(e)(2)(B)(ii). Nonetheless, the court held that the defendant was subject to an enhanced sentence, because his conduct fell within the catch-all phrase of that section, which defines a "violent felony" to include any "conduct that presents a serious potential risk of physical injury to another." 882 F.2d at 604.

Second, the modern definition of burglary is the definition that Congress used in the 1984 statute, and neither the language nor the purpose of the 1986 Act suggests that Congress wished to narrow that definition in 1986. To the contrary, the available evidence indicates that Congress intended the 1986 amendment to expand, not contract, the category of predicate offenses and to reach burglaries to the same extent as the 1984 statute.

2. At the same time, we do not believe that Congress in 1986 meant to include within the definition of "burglary" anything that a State chose to call "burglary" and to exclude anything the State chose not to call "burglary." While such a scheme would have the advantage of simplicity, it would produce anomalies that, we submit, Congress could not have intended. Everything would turn on nomenclature: a conviction in one State that chose to apply the term burglary very broadly to a variety of property offenses would be a predicate crime under the Armed Career Criminal Act, while the same conduct in other States, which used the term more restrictively, would not. Absent any indication that Congress intended to abandon the sensible generic definition in the 1984 statute in favor of a definition turning on statutory labels, it is erroneous to rely entirely on the label attached to the offense by the State of conviction.

3. There is no support in the language or legislative history of the 1986 Act for petitioner's proposed construction—that "burglary" within the meaning of

the 1986 statute includes only those burglary offenses that have as an element conduct that presents a serious risk of physical injury to others. The 1986 statute lists as predicate offenses certain specific crimes, including burglary, and it also contains a catch-all clause that includes any crime that "involves conduct that presents a serious potential risk of physical injury to another." If Congress had intended burglary to be a predicate offense only when it involved conduct presenting a demonstrable risk of physical injury, there obviously would have been no need to list the offense of burglary separately. Congress could have relied on the catch-all clause that includes all felonies involving a serious risk of physical harm.

The legislative history of the 1986 statute makes it clear that the specific inclusion of burglary, along with arson, extortion, and explosives offenses, was not accidental. The House bill would have included those offenses only if they were shown to involve a serious risk of physical harm—essentially the construction petitioner urges upon the Court here. The Senate bill, by contrast, would have included all burglaries as well as all other crimes involving a serious risk of injury to persons *or property*. The compromise bill, which was enacted, designated four specific property crimes, including burglary, as well as any crimes involving a risk of injury to persons. The legislative background makes clear that Congress intended precisely what the language of the statute denotes—that "violent felony" was meant to include all felonies involving violence to persons, and four specific felonies, including burglary, that primarily involve violence against property. The court of appeals therefore properly considered petitioner's two convictions for second-degree burglary in determining that he should be sentenced under the enhanced sentencing provision of the Armed Career Criminal Act.

ARGUMENT

"BURGLARY" UNDER SECTION 924(e)(1) INCLUDES ANY UNLAWFUL ENTRY INTO A BUILDING FOR THE PURPOSE OF COMMITTING A CRIME

A. The Term "Burglary" In Section 924(e) Is Not Restricted To Its Common Law Definition

The Armed Career Criminal Act, as amended in 1986, provides that a previously convicted felon who possesses or receives a firearm, and who "has three previous convictions * * * for a violent felony or a serious drug offense, or both, * * * shall be * * * imprisoned not less than fifteen years * * *" 18 U.S.C. 924(e)(1) (Supp. V 1987). The statute then defines the term "violent felony" to include, among other offenses, any felony that "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii) (Supp. V 1987). The statute does not define the term "burglary." Contrary to petitioner's suggestion (Br. 12-14), however, that omission does not render Congress's use of the term superfluous.

1. As this Court has recognized, "[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979); see also *John Doe Agency* v. *John Doe Corp.*, No. 88-1083 (Dec. 11, 1989), slip op. 7-8. Under its ordi-

nary, contemporary definition, the term "burglary" means the unlawful entry of a building with the intent to commit a crime inside. See, *e.g.*, ALI, *Model Penal Code* § 221.1 (1985) ("A person is guilty of burglary if he enters a building or occupied structure * * * with purpose to commit a crime therein * * *."); National Commission on Reform of Federal Criminal Laws, *Final Report* § 1711 (1971) ("A person is guilty of burglary if he willfully enters or surreptitiously remains in a building or occupied structure * * * with intent to commit a crime therein."). As leading commentators have noted, "modern statutory definitions of the crime [of burglary] * * * encompass entry at all times of all kinds of structures." W. LaFave & A. Scott, *Handbook on Criminal Law* § 96, at 708 (1972); see also R. Perkins & R. Boyce, *Criminal Law* 270 (1982). In other words, although statutes "vary from state to state, * * * the essence of the offense remains the same: an intrusion into a structure with the intent to commit a crime therein." 3 C. Torcia, *Wharton's Criminal Law* § 342, at 235 (14th ed. 1980).

The common law definition of burglary was significantly narrower than the accepted modern definition. At common law, burglary consisted of "the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.13, at 464 (1986). The modern definition of burglary, however, has departed from the common law definition in four important respects: it does not require a "breaking"; it does not require that the building entered be a dwelling house; it does not require that the entry be made at nighttime; and it does not require that the object offense be a felony.

ALI, *Model Penal Code and Commentaries, Part II* § 221.1, at 61 (1980).

Two circuits have held that the term "burglary" in the 1986 version of the Armed Career Criminal Act must be assigned its common law meaning, since Congress did not specifically define the term. See *United States* v. *Chatman*, 869 F.2d 525 (9th Cir. 1989); *United States* v. *Headspeth*, 852 F.2d 753 (4th Cir. 1988); see also J.A. 36-45 (Bright, J., dissenting). Petitioner, however, does not vigorously press that argument; in fact, he expresses "doubts that Congress intended the common law meaning of burglary to control the definition of 'violent felony' in the enhancement statute." Pet. Br. 30 n.8. Nonetheless, he argues that "use of the common law definition is preferable to that employed by the Eighth Circuit and to the standard urged by the Government." *Ibid.*; Pet. Br. 33 n.9.

The Court has observed that when Congress fails to define a term, it is presumed to intend the term to be given its common law meaning. See, *e.g.*, *United States* v. *Turley*, 352 U.S. 407, 411 (1957); *Morrissette* v. *United States*, 342 U.S. 246, 263 (1952). That proposition, however, is an application of the more general principle that Congress ordinarily intends undefined terms to have their conventional, accepted meaning. See *Morrissette*, 342 U.S. at 263 ("where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, * * * absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them").

Where the common law definition of a term has remained the conventional interpretation, that definition is naturally presumed to be the one Congress

intended. But the common law definition does not ordinarily apply where "the present common understanding of the word departs largely from the technical meaning it had at the old common law." *Reagan* v. *United States*, 157 U.S. 301, 302 (1895) (refusing to adopt the common law definition of the term "felony"). When a term has evolved beyond its common law meaning, as is the case with the term "burglary," [5] the Court has applied the "ordinary, contemporary, common meaning" of the term, not the antiquated formulation from early common law. See *Perrin* v. *United States*, 444 U.S. at 42 ("bribery" under the Travel Act, 18 U.S.C. 1952, is not confined to the common law definition); *United States* v. *Nardello*, 393 U.S. 286 (1969) ("extortion" under the Travel Act is defined according to its contemporary understanding, not according to the restrictive common law definition). Thus, in concluding that the offense proscribed in 18 U.S.C. 2113(b) is not limited to common law larceny, the Court stated:

> We cannot believe that Congress wished to limit the scope of the [statute's] coverage, and thus limit its remedial purpose, on the basis of an arcane and artificial distinction more suited to the social conditions of 18th-century England than the needs of 20th-century America.

Bell v. *United States*, 462 U.S. 356, 362 (1983).

The same analysis applies here. The common law definition of burglary has almost completely disappeared from modern statute books. Only the States adhere to the common law definition,[6] which even petitioner acknowledges is "anachronistic." Pet. Br. 30 n.8. In its place, the States have adopted a statutory formula similar to that of the Model Penal Code—the unlawful entry of a building with intent to commit a crime inside. That formulation, with

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[5] As one commentator noted a generation ago, "[o]f all common law crimes, burglary today perhaps least resembles the prototype from which it sprang." Note, *Statutory Burglary—The Magic of Four Walls and a Roof*, 100 U. Pa. L. Rev. 411, 411 (1951).

[6] Those States are Maryland, Massachusetts, North Carolina, Rhode Island, and West Virginia. Even among those States, the Maryland, North Carolina, and West Virginia statutes depart somewhat from the common law formulation, and Rhode Island retains the common law formulation as a matter of court decision, not statutory definition. See Md. Ann. Code art. 27, § 30(a) (1987) (burglary defined according to common law, except that the object offense may include the theft of goods of any value); N.C. Gen. Stat. § 14-51 (1986 & Supp. 1988) (object offense may include larceny regardless of value of property in question; building is covered even if not a "dwelling house," as long as it contains at least one room used as a sleeping apartment); R.I. Gen. Laws § 11-8-1 (1981) (burglary undefined in statute; construed as adopting the common law meaning, see *State* v. *O'Rourke*, 121 R.I. 434, 399 A.2d 1237 (1979); W. Va. Code § 61-3-11 (1984) (breaking and entering into dwelling house is burglary even if committed during daytime). Thus, only one State—Massachusetts—has enacted a statute that fully accords with the common law definition of burglary. Mass. Ann. Laws ch. 266, § 14 (Law. Co-op. 1980 & Supp. 1989). Although the court of appeals in *United States* v. *Hill*, 863 F.2d 1575, 1582 n.5 (11th Cir. 1989), counted Virginia among the States that have retained the common law formulation. Virginia does not limit burglary in that fashion. Virginia includes within the definition of "statutory burglary" a daytime or nighttime entry into any "office, shop, storehouse, warehouse, banking house, or other house" with intent to commit larceny or any felony. Va. Code Ann. §§ 18.2-90, 18.2-91 (1988).

minor variations, is followed in more than 80 percent of the States.[7]

When Congress drafted the Armed Career Criminal Act of 1984 and amended that Act two years later, it was plainly aware of the prevailing modern definition of the term, since it specifically adopted that definition in the 1984 statute. In that statute, Congress defined "burglary" to mean "entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." That definition is almost precisely the same as the Model Penal Code definition, and it is similar to the definition used in most state penal codes.[8] Even if the 1984

[7] The Missouri second-degree burglary statute, see note 2, *supra*, is quite typical. It defines second-degree burglary as entering unlawfully or knowingly remaining unlawfully in a building or inhabitable structure for the purpose of committing a crime therein. Mo. Rev. Stat. § 569.170 (1986). While some States have broader statutes, 41 States include within the definition of "burglary" any illegal entry into a building for the purpose of committing either any criminal offense or certain criminal offenses, especially theft. The remaining nine States include the five States that use some variant of the common law definition and four others with unusual statutory provisions. Michigan does not have any general statutory crime denominated burglary, but it reaches the contemporary offense of burglary under the rubric of breaking and entering. Mich. Comp. Laws Ann. § 750.110 (West 1968 & Supp. 1989). Arkansas, Montana, and Ohio all limit burglaries to entries into "occupied" or "occupiable" structures, although Arkansas and Montana define the limiting term so broadly that it includes any building where business is, or could be, transacted. See Ark. Stat. Ann. §§ 5-39-101(1), 5-39-201 (1987); Mont. Code Ann. §§ 45-2-101(40), 45-6-204(1) (1988); Ohio Rev. Code Ann. §§ 2909.01, 2911.12 (Anderson 1987).

[8] That definition is also similar to the definition that Congress has used in two other burglary statutes. In 1984, Con-

statute had not defined the term "burglary," it would be natural to assume that the contemporary, generic definition of burglary is the one Congress intended. That assumption is particularly powerful in this context since Congress expressly adopted the generic definition in the Armed Career Criminal Act of 1984 and, as we show below, gave no indication in the 1986 amendments of an intent to replace the generic definition with a more restrictive one. It is therefore

gress enacted a prohibition against "burglaries involving controlled substances," which prohibited persons from entering or remaining in "the business premises or property" of a person registered to dispense controlled substances for the purpose of stealing drugs. 18 U.S.C. 2118(b). Two decades earlier, Congress enacted a second-degree burglary statute for the District of Columbia, which reached entries, during day or night, into any building, whether occupied or not, with intent to commit any criminal offense. Act of Dec. 27, 1967, Pub. L. No. 90-226, Tit. VI, § 602, 81 Stat. 736, codified at D.C. Code Ann. § 22-1801 (1981).

It is true that in the Uniform Code of Military Justice (UCMJ) Congress adopted the common law definition of burglary. See 10 U.S.C. 929. But the burglary provision of the UCMJ has not been substantively amended since 1950, and even then the provision was largely a codification of the crimes already found in military law. Prior to enactment of the UCMJ, burglary was defined in military law according to the common law formulation. See J. Appleton, *Military Law for the Company Commander* 75 (1944). The use of the common law formulation in the UCMJ therefore provides no support for the view that when Congress uses the term "burglary," it intends to adopt the common law formulation. Similarly, burglary is defined according to the common law meaning in 18 U.S.C. 3185(8), but the pertinent language of that little-used statute, which governs the extradition of fugitives to countries occupied by the United States, was enacted at the time of the Spanish-American war and has not been amended since. See Act of June 6, 1900, ch. 793, 31 Stat. 656.

sensible to apply the 1984 definition to the term as used in the 1986 version of the statute, even though Congress failed to reenact the definitional section from the 1984 Act.

2. The legislative history of the Career Criminals Amendment Act of 1986 supports the conclusion that Congress intended that statute to carry forward the generic definition of burglary expressly set forth in the Armed Career Criminal Act of 1984.

In the early 1980s, Congress made several efforts to pass legislation directed at career criminal offenders. Those legislative proposals were based on the recognition that career offenders commit a grossly disproportionate number of crimes. Accordingly, the purpose of the career criminal legislation was to provide stringent federal penalties for such recidivist offenders. As Senator Specter, the principal Senate sponsor of the legislation, explained:

> [A] surprisingly small number of criminals commit the vast majority of crimes. Studies reveal that six percent of the criminals arrested commit as much as 70% of the serious crime in this country. The statistic is startling, but the implication is evident: by targeting our resources on this six percent we can dramatically reduce crime.

Armed Career Criminal Act: Hearings on H.R. 1627 and S. 52 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 17 (1984).

The first predecessor of the bill that ultimately became the Armed Career Criminal Act of 1984 was introduced in the Senate in 1981. That bill focused on robbery and burglary, the two principal offenses committed by career criminals. See S. Rep. No. 585,

97th Cong., 2d Sess. (1982). Although that bill passed both Houses in 1982, it was included as part of a larger anti-crime package that was pocket-vetoed by the President.

In the next Congress, Senator Specter again introduced a bill to combat career criminals; once again, the bill focused on the crimes of robbery and burglary. Introducing the bill, Senator Specter explained that robberies and burglaries

> occur with far greater frequency than other violent felonies, affect many more people, and cause the greatest losses. * * * Burglaries involve invasion of [innocent individuals'] homes or workplaces, violations of their privacy, and loss of their most personal and valued possessions. * * * Most robberies and burglaries are committed by career criminals * * * [who] often have no lawful employment; their fulltime occupation is crime for profit and many commit crimes on a daily basis. * * * Various studies also indicate that for every time a career criminal is arrested for robbery or burglary, he has probably committed 10 to 20 such crimes. Career criminals commit robberies and burglaries interchangeably.

129 Cong. Rec. 599 (1983) (remarks of Sen. Specter). As reported by the Senate Judiciary Committee, Senator Specter's bill contained a definition of the term "burglary" that used the language ultimately enacted in the Armed Career Criminal Act of 1984. See S. Rep. No. 190, 98th Cong., 1st Sess. 2 (1983). The definition was inserted in response to suggestions that it was necessary to avoid the risk that the term would be read restrictively and confined to common law burglary. See *Armed Robbery and Burglary Prevention Act: Hearing on H.R. 6386 Before the Subcomm. on Crime of the House Comm.*

on the Judiciary, 97th Cong., 2d Sess. 36 (1982) (testimony of Deputy Assistant Attorney General Roger M. Olsen); *Armed Career Criminal Act of 1983: Hearing on S. 52 Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 11, 18, 20 (1983). The Senate Report explained that the definitional section was inserted to avoid the possibility "that culpable offenders might escape punishment on a technicality." S. Rep. No. 190, *supra*, at 20. After noting that the common law definition of burglary included the requirement that the offense be committed "during the nighttime and with respect to a dwelling," the Report observed that "for purposes of this Act, such limitations are not appropriate." *Ibid.* The bill that ultimately became the Armed Career Criminal Act modified Senator Specter's bill in various respects, but retained the definition of burglary that his bill contained. See H.R. Rep. No. 1073, 98th Cong., 2d Sess. (1984).

The background of the 1984 Act thus makes it clear that the sponsors of the Act adverted to the risk that the term "burglary" would be construed narrowly, according to its common law meaning, and that they included the generic modern definition of the term in order to avoid that risk.

In the Career Criminals Amendment Act of 1986, Congress amended the Armed Career Criminal Act by expanding the category of prior convictions that could lead to enhanced penalties. Rather than requiring that the career offender have three or more prior convictions for either burglary or robbery, the new version of the statute provided for an enhanced sentence if the firearms offender had three prior convictions for either a "serious drug offense" or a "violent felony." Pub. L. No. 99-570, §§ 1401-1402, 100

Stat. 3207-39 to 3207-40 (1986).[9] As we have noted, in the course of expanding the category of predicate offenses Congress omitted the definition of "burglary" that had been contained in the 1984 statute. There is absolutely no indication, however, that Congress intended by that omission to abandon the broad, generic definition of burglary in favor of the more restrictive common law definition.

The Career Criminals Amendment Act of 1986 evolved from three separate bills, two from the House of Representatives and one from the Senate. The Senate bill, S. 2312, 99th Cong., 2d Sess. (1986), and its companion bill in the House, H.R. 4639, 99th Cong., 2d Sess. (1986), made a "crime of violence" a predicate for enhanced penalties: those bills defined a "crime of violence" to include crimes against persons or property that were either

> (A) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or

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[9] Congress actually amended the Armed Career Criminal Act twice in 1986. The first amendment, contained in the Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, §§ 102, 104, 100 Stat. 451-453, 456-459 (1986), recodified former 18 U.S.C. App. 1202 (1982 & Supp. II 1984) as 18 U.S.C. 924(e) (Supp. IV 1986), with only one minor change. See, *e.g.*, *United States* v. *Taylor*, 882 F.2d at 1024; *United States* v. *Headspeth*, 852 F.2d at 757 n.1. Congress retained the generic definition of burglary, consisting of entering and remaining surreptitiously within a building of another to engage in conduct constituting a federal or state offense. The statutory language was changed only by omitting the distinction between felony burglary and those state misdemeanor burglary offenses that were punishable by a prison term of two years or less. The more significant amendment to the Armed Career Criminal Act was the one made several months later by the Career Criminals Amendment Act of 1986.

(B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Senator Specter, who introduced S. 2312, understood that the bill would "broaden th[e] definition [of career criminal] so that we may have a greater sweep and more effective use of this important statute." *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 44 (1986) (reporting text of H.R. 4639) [*House Hearing*]. On the Senate floor, Senator Specter stated that his bill would "broaden the so-called predicate crimes to include drug violations and certain other serious violent acts. This amendment would change the law by broadening the prior convictions which lead to the classifications of being a 'career criminal.'" 132 Cong. Rec. 7697 (1986).[10]

The Senate hearings on Senator Specter's bill reveal a shared understanding that the bill would expand the scope of the Armed Career Criminal Act. No mention was made of adopting a more restrictive definition of burglary. For example, Representative Wyden, sponsor of the companion House bill, explained that the Act, although successful to date,

[10] Senator Specter entered into the Congressional Record a letter from the Department of Justice, expressing the Department's understanding that the proposed amendment would expand the coverage of the Armed Career Criminal Act beyond (but still including) robbery and burglary. See Letter from Assistant Attorney General John R. Bolton to Senator Arlen Specter (Mar. 18, 1986), *quoted at* 132 Cong. Rec. 7698 (1986).

"would be much more effective if the predicate offenses were extended beyond robbery and burglary to include crimes of violence and serious drug offenses. That's precisely what the bill we recently introduced would do." *The Armed Career Criminal Act Amendments: Hearing on S. 2312 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 6 (1986) (reporting text of S. 2312) [*Senate Hearing*]; see *House Hearing* 10. And Deputy Assistant Attorney General Knapp observed that the Senate bill would "expand the coverage of the act" while retaining robbery and burglary as predicate offenses. *Senate Hearing* 9. "The term 'crime of violence' would include robberies and burglaries," he noted, "since both are felonies that by their nature involve a substantial risk that physical force against the person or property of another may be used in the course of committing them." *Ibid.*[11]

The situation was more complicated in the House of Representatives. In addition to Representative Wyden's bill, H.R. 4639, the House considered H.R. 4768, 99th Cong., 2d Sess. (1986), a bill sponsored by Representatives Hughes and McCollum that also expanded the category of predicate offenses under the Armed Career Criminal Act. Like H.R. 4639, the Hughes/McCollum bill provided that a crime could be a predicate offense for sentence enhancement if it fell

[11] The definition of "crime of violence" in Senator Specter's bill (and the House equivalent) was taken from 18 U.S.C. 16, which clearly includes burglary. See S. Rep. No. 225, 98th Cong., 1st Sess. 307 (1983) ("offenses such as burglary in violation of a State law" are included, because "such an offense would involve the substantial risk of physical force against another person or against the property").

within one of two broad categories—"violent felony" or "serious drug offense." The Hughes/McCollum bill, however, defined "violent felony" more narrowly than the Senate bill and Representative Wyden's bill; the Hughes/McCollum bill would have limited the definition of "violent felony" to "any State or Federal felony that has as an element the use, attempted use, or threatened use of physical force against the person of another." *House Hearing* 6.

By focusing on the element of use of force against persons, the Hughes/McCollum bill would have eliminated burglaries from the class of predicate offenses for sentence enhancement. At the House hearings, the Department of Justice criticized the Hughes/McCollum bill for that omission, and recommended that burglaries be retained as predicate offenses. Deputy Assistant Attorney General Knapp testified that "one of the critical standard categories involve[s] people with a long history of burglary convictions, because in fact your typical career criminal is most likely to be a burglar * * *. That is probably the No. 1 professional crime." *House Hearing* 26. A representative of the National Association of Criminal Defense Lawyers (NACDL) noted that burglaries would be omitted from the Hughes/McCollum bill as introduced, and suggested that if the Committee wished to retain burglaries as predicate offenses, it should do so "simply by retaining 'burglary' in [the statute] rather than by substituting for it the all-inclusive 'crime of violence' definition proposed in [Representative Wyden's bill and the Senate bill]." *House Hearing* 34. The NACDL representative added that his organization had "no problem" with retaining burglary as a predicate offense for enhanced sentencing. *Id.* at 38.[12] Representative Hughes, the Chairman of the House Subcommittee on Crime, responded to the concerns about the status of burglary at the conclusion of the hearings:

> Frankly, I think on the question of burglaries, I can see the arguments both ways. We have already included burglaries.
>
> My leanings would be to leave it alone; it is in the existing law; it was the existing statute. We can still be specific enough. We are talking about burglaries that probably are being carried out by an armed criminal, because the triggering mechanism is that they possess a weapon. So we are not talking about the average run-of-the-mill burglar necessarily, we are talking about somebody who also illegally possesses or has been transferred a firearm.

House Hearing 41. The other members of the Subcommittee who were present concurred in that view, and agreed with Representative Hughes's suggestion that they should "develop some language to do that." *Ibid.*

As a result of the hearings, the House Judiciary Committee ultimately reported out a clean bill, H.R. 4885, 99th Cong., 2d Sess. (1986). See H.R. Rep. No. 849, 99th Cong., 2d Sess. 6-7 (1986). H.R. 4885 provided in relevant part:

> (B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year that—

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[12] Although Congress ultimately followed precisely the course suggested by the NACDL representative, the NACDL has now taken the position that that the change in the bill did not have the effect that the organization's witness said it would. Br. of NACDL as Amicus Curiae 10.

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) involves conduct that presents a serious potential risk of physical injury to another.

H.R. Rep. No. 849, *supra*, at 7. Subsection (B)(ii) presumably is the language the House Subcommittee developed to cover burglary as it was defined in "the existing statute." *House Hearing* 41. See H.R. Rep. No. 849, *supra*, at 3.

In spite of the amendment, the House bill was still subject to the interpretation that burglary would be covered by the amended statute only if the type of burglary in question involved a substantial risk of physical injury to a person. But there was no suggestion in the new House bill, or in the report accompanying it, that the House proposal would restrict burglary to the common law meaning of the term. See H.R. Rep. No. 849, 99th Cong., 2d Sess. (1986).

The House passed the bill in that form. 132 Cong. Rec. H6739 (daily ed. Sept. 11, 1986). The Senate, however, preferred Senator Specter's version of the Career Criminals Amendment Act. That version, which reached offenses presenting a risk of injury to property as well as a risk of injury to persons, would indisputably have reached all burglaries, not just those involving a risk of injury to persons. The Senate passed Senator Specter's version of the bill on September 30, 1986. See 132 Cong. Rec. 27, 252 (1986).

On October 7, a compromise version was presented to the House. 132 Cong. Rec. H9368 (daily ed. Oct. 7, 1986). The compromise bill expressly incorporated the offenses of "burglary, arson, extortion, [and offenses involving] the use of explosives" in addition to the offenses already covered by the House bill. 132 Cong. Rec. H9495 (daily ed. Oct. 8, 1986). Thus, instead of either including all crimes involving risk of injury to property or excluding them all, the compromise bill listed four specific property crimes, including burglary, and also contained a catch-all category for any crime presenting a serious risk of injury to persons. The bill passed both chambers in that form.

In light of the background of the compromise bill, it appears reasonably clear that the bill was designed to preserve the status quo from the 1984 Act with respect to the offense of burglary. Representative Hughes implicitly acknowledged that point when he stated, with respect to the compromise bill, that "[w]e have strengthened the Armed Career Criminal Act by expanding its coverage to drug crimes and violent crimes other than just burglary and robbery." 132 Cong. Rec. H9459 (daily ed. Oct. 8, 1986); see also 132 Cong. Rec. H10,781 (daily ed. Oct. 17, 1986). Certainly, there is no basis in the legislative materials to infer that Congress sought to narrow the definition of burglary used in the 1984 Act and to adopt the common law definition instead. It would have been strongly preferable, needless to say, if the express statutory definition of burglary had been included as part of the compromise bill. In light of the fact that the compromise bill was drafted hastily at the end of the session, however, it is not entirely surprising that the omission of a definitional section would be overlooked.

Congress has recently indicated its awareness of the problems resulting from the omission of the explicit definition of burglary. On October 5, 1989, the Senate passed S. 1711, 101st Cong., 1st Sess. (1989), one provision of which would amend 18 U.S.C. 924 (e). See 135 Cong. Rec. S12,748-12,749, S12,765 (daily ed. Oct. 5, 1989). That amendment expressly reincorporates the generic definition of burglary that was contained in the 1984 Act but omitted from the 1986 amendment. The bill would add the following provision to Section 924(e):

> [T]he term "burglary" means any crime punishable by a term of imprisonment exceeding one year and consisting of entering or remaining surreptitiously within a building that is the property of another with intent to engage in conduct constituting a Federal or State offense.

135 Cong. Rec. S12,804 (daily ed. Oct. 5, 1989). As Senator Biden explained, the amendment "corrects an error that occurred inadvertently when the definition of burglary was deleted from the Armed Career Criminal statute in 1986. The amendment reenacts the original definition which was intended to be broader than common law burglary." 135 Cong. Rec. S12,749 (daily ed. Oct. 5, 1989). That legislation is now pending before the House.

In sum, "the purpose of the 1986 amendments to section 924(e) was to expand the predicate offenses, not restrict them." *United States* v. *Hill*, 863 F.2d 1575, 1581 (11th Cir. 1989). Congress expressed no intention to abandon the generic definition of burglary that was accomplishing the goal of the Armed Career Criminal Act—"to incarcerate repeat offenders, and particularly those found guilty of * * * burglary in the generic form [Congress had] defined." *United States* v. *Palmer*, 871 F.2d 1202, 1205 (3d Cir.), cert. denied, 110 S. Ct. 223 (1989). As this Court has observed in analogous circumstances, "[t]here is nothing in the [amendment's] legislative history to indicate that, in changing the wording of this statute, Congress intended to abandon [its earlier intention]." *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 109 S. Ct. 2218, 2222 (1989). Instead, the legislative record suggests that "Congress intended that any burglary that would have met the definition of burglary under the previous act would fall within the meaning of burglary" under the amended statute. *United States* v. *Hill*, 863 F.2d at 1582; accord *United States* v. *Taylor*, 882 F.2d at 1024-1028; *United States* v. *Dombrowski*, 877 F.2d at 526-530.

B. "Burglary" Under Section 924(e) Does Not Mean Any Offense That The State Labels Burglary

The court below adopted an attractively simple solution to the problem presented by this case. It held that a prior conviction is one for "burglary" whenever the conviction is labeled "burglary" under the law of the State where the conviction was obtained. The Fifth Circuit has adopted the same approach. See *United States* v. *Leonard*, 868 F.2d 1393 (1989), cert. pending, No. 88-1885. While that approach enjoys the advantage of easy application, it could produce anomalous results and appears not to be what Congress had in mind.

From the beginning, Congress intended the Armed Career Criminal Act to impose a uniform federal standard, not to adopt state definitions of crime. Thus, in the 1983 Senate Report, the Senate Judi-

ciary Committee explained that one of the reasons it was adopting an express definition of the terms "burglary" and "robbery" was to ensure "that the same type of conduct is punishable on the Federal level in all cases." S. Rep. No. 190, *supra*, at 20. That statement is consistent with the general rule that "in the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law." *United States* v. *Turley*, 352 U.S. at 411.

Applying a federal standard, rather than incorporating as "burglary" anything that a State may call burglary, is consistent with the purposes of the Armed Career Criminal Act. Congress included burglaries within the reach of the Act because it believed that burglary is one of the principal offenses committed by career criminals, and because it is a serious offense that involves a grave intrusion into privacy and property interests, and sometimes a risk of personal injury as well. The offense that has those characteristics is the generic crime of burglary; those characteristics would not necessarily be shared by any offense that a State chooses to label "burglary," no matter how far removed the State's statute may be from the generic burglary offense.[13] See *United States* v. *Taylor*, 882 F.2d at 1028.

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[13] In response to that objection, the Fifth Circuit has pointed out that burglary statutes do not vary that much among the States and that there are not likely to be many cases in which crimes bearing little resemblance to the generic offense of burglary will be labeled "burglary" under state law. *United States* v. *Leonard*, 868 F.2d 1397 (1989). That argument amounts to saying that although the "state label" approach may be imprecise, it is not likely to be *very* imprecise. Yet the consistency among state burglary statutes is really a point in favor of using the generic definition of burglary, not a point in favor of using state definitions which, although they vary, do not in most cases vary by a lot.

Moreover, under the Fifth and Eighth Circuit approach, if a State chose not to label a particular offense burglary, that would disqualify the offense from being a predicate offense of "burglary" under the Career Criminals Amendment Act, even if the offense would be considered burglary in every other State. That case is not hypothetical. For example, the State of Michigan has no general offense entitled "burglary."[14] It classifies generic burglary as one of several graded forms of "breaking and entering." Under the interpretation of Section 924(e)(2)(B)(ii) that we propose, a conviction in Michigan for entering a building unlawfully for the purpose of committing a crime would count as a predicate offense under Section 924(e), because it would constitute burglary under the generic definition of the crime. Under the interpretation adopted by the Fifth and Eighth Circuits, on the other hand, no violation of the Michigan "breaking and entering" statute would be regarded as "burglary" within the meaning of Section 924(e)(2)(B)(ii), since that offense is not denominated as "burglary" under Michigan law. Under that approach, even if the defendant had five prior convictions for conduct that every other State would consider burglary, he would not be deemed to have been convicted of any burglaries at all within the meaning of Section 924(e) if

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[14] The only section of the Michigan Penal Code that even uses the term "burglary" is a very narrow prohibition against "burglary with explosives." Mich. Comp. Laws Ann. § 750.112 (West 1968 & Supp. 1989).

he were lucky enough to have been convicted all five times in Michigan. That, we submit, is not a rational way to administer the statute and could not have been the result that Congress intended.

Even if there were more to be said for the Fifth and Eighth Circuit position in the abstract, that position is particularly difficult to accept in light of the legislative background of the Career Criminals Amendment Act. As we have noted, Congress adopted a single federal definition of burglary in the 1984 Act, and there is no indication in the legislative record leading up to the 1986 amendments that Congress wished to abandon reliance on a uniform federal standard in favor of a definition that would turn entirely on each State's law. It is highly unlikely that Congress would have endorsed such a radical change in its approach to the enhancement provisions of the Armed Career Criminal Act without leaving any evidence whatsoever of its intention to do so.

C. "Burglary" Under Section 924(e) Is Not Limited To Burglaries That Can Be Shown To Involve A High Risk Of Physical Injury To Persons

Petitioner contends (Br. 15-19, 23-35) that a burglary is not within the definition of "burglary" in Section 924(e) unless it has "as an element necessary for conviction conduct that presents a serious risk of physical injury to another." Br. 35.

1. That argument is foreclosed by the language of the statute. Section 924(e)(2)(B)(ii) defines any "burglary" as a "violent felony" for purposes of the enhancement provision of Section 924(e)(1), and it also includes other crimes that "involve[] conduct that presents a serious risk of physical injury to

another." If, as petitioner suggests, Congress had intended to include only crimes that contain as an element conduct that presents a serious risk of injury to others, it would have used language of that sort in the statute, or it would have expressly modified the reference to burglary, arson, and extortion offenses by excluding any subclass of those offenses that did not involve conduct presenting a serious risk of physical injury to others. The statute provides, however, that a "violent felony" is any felony that *either* "is burglary, arson, or extortion * * * *or* otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii) (Supp. V 1987) (emphasis added). Under that language, it is enough that the offense is burglary; no specific connection with violence need be established.

By analogy, the crime of extortion may be committed without any threat or risk of physical injury, yet the statutory language leaves no doubt that extortion of any type, including extortion by economic duress, is within the reach of Section 924(e)(2)(B)(ii). The same is true of burglary. If petitioner's construction of Section 924(e) were adopted, the specific statutory reference to burglary, arson, and extortion would serve no purpose, since those terms would be fully comprehended within the catch-all category of felonies that "involve[] conduct that presents a serious potential risk of physical injury to another."

No court of appeals has adopted the interpretation that petitioner advocates. Although the courts have taken several different tacks in seeking to ascertain the proper definition of the term "burglary," none has held that a "burglary" offense under Section

924(e)(2)(B)(ii) must contain as an element conduct that presents a serious potential risk of physical injury to another. In *United States* v. *Dickerson*, 857 F.2d 414 (7th Cir. 1988), cert. denied, 109 S. Ct. 1753 (1989), the Seventh Circuit found the language of the statute sufficiently clear to establish that all burglaries satisfy the prerequisites of Section 924. As that court explained, "if Congress intended to include only crimes in which serious physical injury was involved, it would have worded the statute to say "burglary, arson, or extortion, *and* involves use of explosives or otherwise involves conduct that presents a serious risk of physical injury to another." 857 F.2d at 419; see also *United States* v. *Dombrowski*, 877 F.2d at 527-528.

Some courts have analyzed the same issue slightly differently, but have arrived at the same conclusion: that all burglaries are "violent felonies" within the meaning of the 1986 Act. Those courts have read Section 924(e)(2)(B)(ii) as a conclusive determination by Congress that burglary, arson, extortion, and explosives offenses involve the risk of injury to persons, even though they are principally property crimes. See *United States* v. *Palmer*, 871 F.2d at 1208-1209; *United States* v. *Leonard*, 868 F.2d at 1395; *United States* v. *Portwood*, 857 F.2d at 1224. That approach finds support in the use of the term "otherwise" in Section 924(e)(2)(B)(ii): the use of that word at the beginning of the "catch-all" clause suggests that the four specifically identified crimes, including burglary, have already been found to involve conduct that presents a serious potential risk of physical injury to others, and that with the catch-all clause Congress wished to include within the statute's reach any *other* felonies that might also have that attribute.

There is nothing anomalous about referring to "burglary" as a "violent felony," even if the burglary is not conducted at nighttime and is not directed at a dwelling. Generic burglary often involves a risk of violence, since individuals may often be present in homes or commercial establishments when they are burglarized. See *United States* v. *Patterson*, 882 F.2d 595, 604 (1st Cir. 1989), cert. pending, No. 89-5881 ("while burglary may start out as a nonviolent crime, the burglar may resort to violence if someone is on the premises or appears there while the burglary is in process"); *United States* v. *Palmer*, 871 F.2d 1202, 1209 (3d Cir.), cert. denied, 110 S. Ct. 223 (1989) (both residential and commercial burglaries are inherently dangerous); see also *United States* v. *Portwood*, 857 F.2d 1221, 1224 (8th Cir. 1988), cert. denied, 109 S. Ct. 2073 (1989) ("Congress could quite reasonably conclude that no matter what the felon's intent upon breaking in, the property owner may return, a neighbor may investigate, or a law enforcement official may respond. All of these scenarios present a grave threat of harm to persons.").

As Deputy Assistant Attorney General Knapp testified in 1986, burglary "is a potentially very dangerous offense," because in the case of either a typical residential burglary or "a professional commercial burglary, there is a very serious danger to people who might be inadvertently found on the premises. Many crimes of violence do occur in the course of committing a burglary." *House Hearing* 26. It is therefore not surprising that Congress included "burglary" within the category of "violent felonies" without requiring any further showing that the offense of conviction was one that posed a special risk of physical injury to others.

2. The legislative record, which we have reviewed above, supports the conclusion that the 1986 Act does not restrict the definition of "burglary" to those burglaries that can be shown to pose a special risk of physical injury to others. The version of the Hughes/McCollum bill introduced in the House of Representatives following the House hearings on the 1986 legislation was subject to just such an interpretation, because the bill provided that any crime not having physical force against a person as an element could not be a predicate offense for the enhanced sentencing provision unless the crime involved conduct presenting a serious potential risk of physical injury to others. Of course, if all felony burglary offenses are deemed to present a risk of injury to a person, that restriction would be of no importance. The House bill, however, left that matter unclear, and even the House Report did not clarify that point. The House Report explained the Hughes/McCollum bill as follows:

> The other major question involved in these hearings was as to what violent felonies involving physical force against [property] should be included in the definition of "violent" felony. The Subcommittee agreed to add the crimes punishable for a term exceeding one year that involve conduct that presents a serious potential risk of physical injury to others. This will add State and Federal crimes against property such as burglary, arson, extortion, use of explosives and similar crimes as predicate offenses where the conduct involved presents a serious risk of injury to a person.

H.R. Rep. No. 849, *supra*, at 3.

Although there is no written record of the process leading to the compromise bill that ultimately became the Career Criminals Amendment Act, the ambiguous language from the Hughes/McCollum bill did not become law. Instead, as an accommodation between the Senate and House positions, Congress enacted a bill that would not require courts to determine whether burglary is, by nature, a crime that involves a serious risk of injury to persons. Instead, by identifying burglary by name, the bill that was ultimately enacted resolved that question by preempting it. The enacted bill thus rendered it unnecessary for a court, in the case of burglary, to conduct the kind of inquiry that is required in the case of offenses falling within the "catch-all" provision of Section 924(e)(2)(B)(ii).

By arguing that the 1986 Act must be read to require that the crime of conviction have as an element conduct that presents a serious risk of injury to a person, petitioner seeks to construe the Act as if the House bill had been passed, when in fact that bill was displaced by one that specifically addressed, and omitted, the requirement that petitioner would have this Court read into the statute. For the Court now to undo what the compromise bill accomplished would ignore not only the plain language of the statute, but it would also fail to take appropriately into account the legislative process that led to its enactment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ARTHUR LAJUANE TAYLOR

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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I. THE GOVERNMENT'S PROPOSED DEFINITION IS OVERBROAD.

The Government's proposed definition for the term "burglary" in 18 U.S.C. § 924(e) is overbroad, and certain to subject to enhancement persons convicted of burglaries not involving a serious, or even significant, potential risk of physical injury to others. As such, its definition offends the statutory language, principles of fairness and process and Congressional intent.

A. IT IS UNCLEAR HOW THE GOVERNMENT PURPORTS TO DEFINE THE TERM "BURGLARY."

At the threshold, it is unclear specifically how the Government purports to define the term "burglary." In summarizing its argument, the Government asserts that "the modern definition of burglary, which Congress expressly incorporated in the 1984 statute, is the proper definition of the term 'burglary' in the 1986 statute." Respondent's Brief ("Res. Br.") at 8. "Burglary" was defined in the referenced statute as a "felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." 18 U.S.C. (Appendix) § 1202 (1982 & Supp. II 1984) (repealed 1986).

In its argument section, however, the Government asserts: "'Burglary' under Section 924(e)(1) includes any unlawful entry into a building for the purpose of committing a crime." Res. Br. 11-12, *quoting*, *inter alia*, ALI, *Model Penal Code* § 221.1 (1985). *See also* Res. Br. at 11 (argument heading).

Finally, the Government asserts that "it is enough that the offense is burglary," Res. Br. at 33, and that "all burglaries are 'violent felonies' within the meaning of the 1986 Act." *Id.* at 34. These statements appear to embrace the holding of the Eighth Circuit in this case—that any crime labeled "burglary" can be counted as an enhancement offense under the 1986 Act, J.A. 36,—which the

Government disavowed only a few pages earlier. Res. Br. at 29-32. We will assume, except as otherwise noted,[1] that the Government stands by its earlier assertions that the repealed 1984 Act definition should apply here.[2] *See, e.g.*, Brief For The United States In Opposition To Petition For Writ Of Certiorari at 4-6.

B. THE GOVERNMENT'S DEFINITION INCLUDES WITHIN ITS AMBIT OBVIOUSLY NON-VIOLENT OFFENSES LIKE SHOPLIFTING AS SENTENCE ENHANCING PREDICATE OFFENSES.

The definition which the Government espouses undeniably includes within its sweep conduct which should not, as a matter of fairness or logic, subject perpetrators to enhancement under Section 924(e).

For instance, shoplifting literally consists of "entering . . . a building that is property of another with intent to engage in conduct constituting a Federal or State offense." Under California law, shoplifting may constitute burglary. *People* v. *Wilson*, 160 Cal. App. 2d 606, 325 P.2d 106 (1958). *See United States* v. *Chatman*, 869 F.2d 525, 529 n.2 (9th Cir. 1989).[3] Likewise, breaking and entering a vending machine located in the lobby of a building would meet the Government's test. *See, e.g.*, Colo. Rev. Stat.

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[1] As discussed at pp. 10-14 below, the Government's failure to stick with a single definition suggests that there is no ordinary, common meaning of the term "burglary."

[2] As it did in the Respondent's Brief, the Government has previously blurred the distinction between the 1984 Act definition, its "second definition," the Model Penal Code definition, and the definitions of burglary contained in state burglary statutes. *E.g.*, Brief for the United States In Opposition to Petition for Writ of Certiorari at 4. *See* pp. 10-14, below.

[3] In *Chatman*, the Government argued that burglaries of automobiles constituted predicate offenses under § 924(e). 869 F.2d at 528-29.

§ 18-4-204 (1986) (burglary includes breaking into vending machine and coin-operated telephone). Can it seriously be contended, either as a matter of Congressional intent or of fairness, that persons found guilty of shoplifting or stealing from a vending machine should be deemed to have committed a "violent felony" under the Armed Career Criminal Act? An unarmed break-in to a closed and unoccupied gas station to steal several quarts of oil would also subject a person to the drastic enhancement of Section 924(e). This scenario is not whimsical—it is apparently the offense committed by petitioner, or more accurately by those who accompanied him, in 1971, and for which he was convicted under the then-effective Missouri second degree burglary statute. J.A. 11. Should such unarmed burglaries of unoccupied commercial structures be used as enhancing offenses which are denominated as "violent felonies" and under the plain language of the statute must carry a "serious potential risk of physical injury to another"?

The answer to these question is no. In stark contrast to the Government's proposed definition, the test articulated by petitioner would ensure that only persons committing violent crimes that threaten others with physical injury will be labelled "armed career criminals" under Section 924(e). As noted below, that is what Congress intended when it enacted the 1986 legislation.

II. THE LEGISLATIVE HISTORY INDICATES THAT CONGRESS WISHED TO INCLUDE AS PREDICATE OFFENSES ONLY THOSE BURGLARIES THAT NECESSARILY PRESENT A SERIOUS RISK OF PHYSICAL INJURY TO OTHERS.

The Government simply cannot avoid the fact that its proposed definition was *deleted* from the 1986 Act. The Government suggests, without citation, that this highly significant definitional section was merely "overlooked" by Congress. Res. Br. at 27. The Government's surmise is

directly contrary to the presumption that the deletion of limiting language contained in an early version of a bill is intentional. *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983).[4]

The Government's arguments on the issue of legislative history are unpersuasive. It first notes that the definition of burglary contained in the 1984 Act "was inserted in response to suggestions that it was necessary to avoid the risk that the term would be read restrictively and confined to common law burglary." Res. Br. at 19. However, petitioner does not contend and has never contended that the common law definition of burglary is the definition of first choice here.[5]

The Government also contends that the 1986 Act amendments were intended to "expand the scope of the Armed Career Criminal Act." Res. Br. at 22. This assertion begs the question presented in this case. The idea of "expanding" predicate offenses is important only insofar as it indicates the addition of other violent crimes like murder, rape, kidnapping and assault. It is certainly possible to "broaden" the number of predicate offenses (as the 1986 Act assuredly did) while at the same time correcting the definition of a given offense. Thus, although the 1986 Act expanded the potential enhancing offenses from "burglary" and "robbery" to "serious drug offenses" and "violent felonies," it also contracted the definition of burglary to ensure that only those which were "violent" would constitute enhancing, predicate offenses. This is evi-

[4] The Government fails to cite or discuss *Russello* in its brief.

[5] Petitioner does, however, contend that the common law definition is superior to that urged by the Government, since the latter would necessarily subject to enhancement many more persons convicted of burglaries not involving a serious risk of injury to others. *See Brief for Petitioner* ("Pet. Br.") at 33 n.9.

denced, simply but convincingly, by the decision of Congress to employ the term "violent felony."[6]

The Government focuses heavily upon the testimony of its own Deputy Assistant Attorney General Knapp. Res. Br. at 23, 24. He testified that "the term 'crime of violence' would include robberies and burglaries, since both are felonies that by their nature involve a substantial risk that physical force against the person or property of another may be used in the course of committing them." *The Armed Career Criminal Act Amendments: Hearing on S2312 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 9 (1986) (Reporting Text of S2312) ("*Senate Hearing*"). As a mere witness at a Congressional hearing, Knapp's testimony carries little or no weight in determining Congressional intent. *Kelly* v. *Robinson*, 479 U.S. 36, 50 n.13 (1986). Moreover, all of Knapp's testimony in the Senate hearing discussed another, significantly broader predicate offense definition, "crime of violence," which included any crimes that involved violence not only to persons but also to *property*. S. 2312, 99th Cong., 2d Sess. (1986). *See Senate Hearing* at 9 (Knapp testimony). Furthermore, the Government does not even respond to petitioner's suggestion that the eventual rejection of this formulation of the definition of the predicate offense is made more significant by its inclusion elsewhere in the Armed Career Criminal Act. *See* Pet. Br. at 18.

The Government notes that the ultimately enacted, compromise version of the "violent felony" definition spe-

[6] Similarly, the statement of Representative Hughes that "[w]e have strengthened the Armed Career Criminal Act by expanding its coverage to drug crimes and violent crimes other than just burglary and robbery" does not go to the issue of the appropriate definition of the term "burglary," contrary to the Government's assertion. *See* Res. Br. at 27.

cifically included burglary, arson, extortion, and offenses involving the use of explosives, which the Government describes as property crimes. Res. Br. at 27. Respondent tacitly suggests that Congress intended that all such "property crimes" (including all burglaries, whether or not they include a serious risk of injury to persons) would constitute enhancing offenses. *Id. See also id.* at 33-34.

This argument is belied by the language of the statute itself. Nowhere is "property" mentioned in Section 924(e)(2)(B). Instead, a violent felony must have as an element "the use, attempted use, or threatened use of physical force *against the person of another,*" or be "burglary, arson, or extortion, involve[] use of explosives, or *otherwise* involve[] conduct that presents *a serious potential risk of physical injury to another.*" 18 U.S.C. § 924(e)(2)(B)(i) and (ii).

Rather than the hidden meaning imparted by the Government, the language of the statute as enacted suggests that Congress wished to recognize that burglary and the other listed offenses[7] *could*, under certain circumstances, involve a threatened use of force against another, 18

[7] The crime of arson, and crimes involving the use of explosives, tend to carry a more substantial risk of injury to persons than does burglary. In contrast, although extortion typically involves the threat of force, violence, or fear, *see, e.g.*, 18 U.S.C. § 1951(b)(2); *id.* § 875(b) and (c), some extortion statutes may only involve a threat to the property or reputation of another. *See, e.g.*, 18 U.S.C. § 875(b); *id.* § 891(b). Because extortion does not always require conduct that threatens others with physical injury, the rule espoused by petitioner —that burglaries must necessarily involve a serious risk of injury to another person to qualify as predicates—is also properly applicable to the term "extortion" as used in the 1986 Act. Significantly, there is no support for the Government's casual assertion that "the statutory language leaves no doubt that extortion of any type, including extortion by economic duress, is within the reach of Section 924(e)(2)(B)(ii)," and none is cited by the Government. *See* Res. Br. at 33.

U.S.C. § 924(e)(2)(B)(i), or present a serious potential risk of physical injury to another. 18 U.S.C. § 924(e)(2)(B)(ii). It is understandable and quite likely that Congress wished to make clear to those who would later attempt to interpret the term "violent felony" that burglary and the others were not to be disqualified as enhancing offenses *merely* because they are "crimes against property." In other words, under certain aggravated circumstances these offenses can involve the threatened or actual physical injury to a person, though they will not necessarily do so in all instances.[8]

[8] Thus, the Arkansas Supreme Court reversed a jury's consideration of a prior conviction for "burglary," without any further description of the underlying conduct, as an aggravating circumstance in a capital case. *Williams* v. *State*, 621 S.W.2d 686 (Ark. 1981). The prosecution submitted that a prior conviction for any "burglary," without more, was an aggravating circumstance under a definition which is nearly identical to Section 924(e)(2)(B). *Id.* at 687. The statute made a prior felony conviction an aggravating circumstance when it had an element "which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person." *Id. Cf.* 18 U.S.C. § 924(e)(2)(B).

In reversing, the Arkansas Supreme Court stated:

> Under the Criminal Code a person commits burglary if he enters or remains unlawfully in another person's occupiable structure with the purpose of committing therein an offense punishable by imprisonment. [Citation omitted.] Thus burglary can be committed by an unlawful entry into a vacant house, with no possibility of violence or injury to anyone. The jury had no substantial basis for finding this particular aggravating circumstance, which should not have been submitted without proper supporting proof.

621 S.W.2d at 687. Thus, the court recognized that unlawful entry into an occupiable structure did *not* necessarily create a threat of violence or substantial risk of physical injury to another person. Similarly, the inclusion of all purportedly "generic" burglaries as predicate convictions for enhancement, as the Government advocates, necessarily includes many "burglaries" which present no threat of injury to others.

Perhaps most significant is the language of House Committee members themselves:

> 1. "[It is] *not inadvertent* that we left it [burglary] out"; *Armed Career Criminal Legislation: Hearing on H.R. 4768 Before the Subcomm. on Crime on the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 26 (1986) (hereinafter "*House Hearing*");
>
> 2. "[We] will add . . . burglary . . . *where the conduct involved presents a serious risk of injury to a person*"; H.R. Rep. No. 98-849, 99th Cong., 2d Sess. 3 (1986) (hereinafter "*House Report*");
>
> 3. "[Section 924(e)(2)(B)(ii)] includes State and Federal felonies against property *that present a serious potential risk of physical injury to a person*"; *House Report* at 4;
>
> 4. "Subsection 2(B)(ii) adds all State and Federal felonies against property such as burglary, arson, extortion, use of explosives and similar crimes as predicate offenses *where the conduct involved presents a serious risk of injury to a person*"; *Id.* at 5.

(Emphasis supplied).

The House Committee which reported out H.R. 4885 deemed that the language of subdivision (ii) therein, *i.e.*, "involves conduct that presents a serious potential risk of physical injury to another," would include burglary and the other "property crimes" *only* where the conduct presented a serious risk of injury to a person. *House Report* at 4. Thus, after the Senate's proposed definition including all violent crimes against property was rejected, it is not surprising that the Senate had those property crimes specifically enumerated in the House definition. Their inclusion in the compromise version which eventually became law makes it clear that the enumerated offenses may also present an occasional risk of injury to *persons*, even though they are generally considered crimes against property.

For these reasons, the legislative history and governing principles of statutory interpretation both suggest that the term "violent felony" in Section 924(e)(2)(B) includes only those burglaries which involve conduct presenting a serious potential risk of physical injury to another. Indeed, the very language cited by the Government, as support for its position that the House decided to include all burglaries as a predicate offense, Res. Br. at 25, appears to support petitioner's argument that the House was distinguishing violent, dangerous burglaries from the routine non-violent burglary:

> We are talking about burglaries that probably are being *carried out by an armed criminal*, because the triggering mechanism is that they possess a weapon. So *we are not talking about the average run-of-the-mill burglar*, necessarily. . . .

House Hearing at 41 (comments of Rep. Hughes, sponsor of bill that did not include property crimes) (emphasis added).

Additionally, the plain language of the Act itself convincingly refutes the government's notion that Congress intended all burglaries to be used as predicate offenses under the Armed Career Criminal Act. According to the Act, a "violent felony" includes any crimes that "is burglary . . . or *otherwise* involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). Inclusion of the word "otherwise" is instructive with regard to Congress' intent. If the government were correct in its argument that Congress intended burglaries that do not pose a serious risk of physical injury to another person to qualify as predicate offenses, there would have been no need to include the word "otherwise" in the last phrase of subsection (ii). Instead, the relevant portion of the Act would have defined "violent felony" to include any crime that "is burglary . . . or involves conduct that presents a serious

potential risk of physical injury to another." Obviously, Congress chose not to so define the term "violent felony." The Government's proposed interpretation of subsection (ii) essentially reads the word "otherwise" out of the Act, thereby violating a fundamental principle of statutory construction that effect be given to every word in a statute. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979).

It is clear that Congress recognized that some, but not all, burglaries present a risk of physical injury to others. It is also apparent that the only categorical interpretation of the term burglary consistent with that intent is the one advanced by petitioner.[9]

III. THE GOVERNMENT'S PROPOSED DEFINITION OF THE TERM "BURGLARY" IS NOT THE "ORDINARY, CONTEMPORARY" DEFINITION OF THAT TERM.

The Government asserts that its formulation constitutes the "ordinary, contemporary definition" of the term burglary. Res. Br. at 11-12. It is also claimed that this purportedly "generic" definition is used by "an overwhelming majority of modern jurisdictions." *Id.* at 6. These statements are incorrect. Moreover, modern burglary statutes are not the only ones at issue, as evidenced by the Government's attempt to enhance based upon 18 and 26 year-old burglary convictions under a *repealed* statute.

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[9] The Government also notes that a proposal to add the purported "generic definition of burglary" to Section 924(e) is being considered by the Congress. Suffice it to say that this is not the law, and this proposal may trigger the same debate that led to the previous deletion of the 1984 Act's definition. Moreover, it is a "patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant." *See Johnson* v. *Transportation Agency*, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting).

For starters, far from a single generic definition, the Government has espoused at least *two separate* definitions—the 1984 Act definition, and its own formulation, derived apparently from various sources.[10] The second definition requires only "unlawful entry," while the 1984 Act requires "entering or remaining surreptitiously." The second definition does not require that the building be that of another—the 1984 Act has such a requirement. The second definition requires that there be intent to commit a crime, while the 1984 Act definition requires "intent to engage in conduct constituting a Federal or State offense." Finally, the 1984 Act encompasses only felony burglaries, while the second definition is not so limited.[11]

These distinctions are not academic. For instance, the 1984 Act's "entering or remaining" criterion differs from the nineteen states which premise burglary solely on entry. *See*, *e.g.*, Okla. Stat. Ann. tit. 21, § 1431 (West 1983). The term "unlawful entry" (employed in the Government's second definition) differs from the laws of 27 states, which use the term "entering or remaining unlawfully."[12] For example, compare Md. Ann. Code art. 27, §§ 30-31A (1988) (breaking and entering is unlawful

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[10] To wit, "[U]nder its ordinary, contemporary definition, the term burglary means the unlawful entry of a building with the intent to commit a crime inside." Res. Br. at 11-12.

[11] Not all burglaries are felonies. *E.g.*, Tex. Penal Code Ann. § 30.03 (Vernon 1989).

[12] If the Government's "second definition" is adopted, mini-trials will be required as to convictions occurring in these 27 states to determine whether a defendant was found guilty of "entering" as opposed to "remaining." The following hypothetical situation is illustrative. A person "legally" enters a store five minutes prior to closing. He hides, and remains inside ("unlawfully") until store personnel go home. He then loots and ransacks. Under the second definition, this would not be "burglary."

and required for burglary conviction), with Mo. Rev. Stat. § 569.170 (1986) (entering or remaining unlawfully is sufficient).

Both of the Government's proposed standards are limited to burglaries of "buildings." However, many state statutes speak not only of buildings but of structures. Burglaries can occur in pay phones, watercraft, caves, and fenced commercial and residential yards. *E.g.*, Colo. Rev. Stat. § 14-4-204 (1986) (pay phone and vending machines); Ga. Code Ann. § 16-7-1 (1988) (watercraft); Ariz. Rev. Stat. Ann. § 13-506 (1989) (fenced commercial and residential yard); Neb. Rev. Stat. § 28-507 (1989) (any real estate or any improvements). These sites do not constitute "buildings." Therefore, where the purported predicate offense occurred in a state extending burglary to something other than buildings, the sentencing court will need to determine whether or not the burglary involved entry into a building, thus qualifying as a predicate offense under the Government's test. And again, the Government's language is far from "generic."

Third, the phrases "with intent to engage in conduct constituting a Federal or State offense" (1984 Act) and "intent to commit a crime" (second definition) are broader than many state statutes. At least eighteen states require that there be intent to commit a larceny/theft or felony. *E.g.*, Nev. Rev. Stat. § 205.060 (1987). Three others require intent to commit assault, theft or any felony. *E.g.*, Iowa Code Ann. § 713.1 (West Supp. 1989). Once again, neither of the Government's definitions are necessarily the "ordinary" one.

Last but not least, in asserting that eighty percent of the states have, "with minor variations," adopted its definition, the Government has ignored an entire genre of burglary statutes.[13] The vast majority of states have first

[13] The Government also contends that the "modern" definition of burglary has departed from the common law definition in four ways. Res. Br. at 12. In each instance, however, significant numbers of states still follow the purportedly abandoned requirement. The Government asserts that a "breaking" is no longer required. However, Indiana, Maryland, Massachusetts, Mississippi, Nebraska, North Carolina, Oklahoma, Rhode Island, West Virginia (when during the day) and Virginia have such a requirement. *E.g.*, Ind. Code § 35-43-2-1 (Burns 1985). Second, the modern definition does not contain the requirement that the building entered be a dwelling house, according to the Government. Yet Maryland, Massachusetts, North Carolina, Rhode Island and Virginia retain this requirement, and many of the states vary the degree or classification of the crime based upon the dwelling distinction. The third "abandoned" requirement—nighttime entry—is still codified in the five "common law" states noted by the government, Res. Br. at 15 n.6, while at least seven others, Connecticut, Delaware, Idaho, New Hampshire, North and South Dakota and South Carolina vary the degree or classification of the crime based upon a nighttime entry. *E.g.*, Idaho Code § 18-1402 (1987). Fourth, the Government asserts that the object offense need not be a felony. However, Indiana, Massachusetts and North Carolina require the offense to be a felony, and 18 other states limit the object offense to felonies or larceny/theft. Iowa, Utah and Vermont require the object offense to be either a felony, theft, or assault. *E.g.*, Utah Code Ann. § 76-6-202 (1978).

degree or aggravated burglary provisions that proscribe conduct considerably narrower than that falling within the ambit of the Government's formulation. These statutes typically require that the perpetrator be armed with a deadly weapon or explosives, that he causes or threatens immediate physical injury to a non-participant in the crime, or that a non-participant is present. *See* Mo. Rev. Stat. § 569.160 (1986); *id.* § 560.040 (1969) (repealed). The fact that the Government's definitions are analogous (though, as noted above, far from identical) to some second degree burglary statutes, but not to most first degree statutes further belies the notion that the Government's definition is the common meaning of burglary.[14]

[14] First degree burglary statutes, to a far greater degree than

In sum, because they do not fairly reflect the wide variety of state burglary statutes, the Government's definitions cannot be deemed "ordinary," "contemporary," or "generic." Contrary to the Government's assertions, neither can therefore be presumed to be the meaning intended by Congress. *See* Res. Br. at 13-16. Moreover, they will, in certain instances, mandate the conduct of the mini-trials that the Government apparently eschews. *See* Res. Br. at 37 (inquiry into conduct with respect to burglary convictions claimed to be "rendered . . . unnecessary" by Government's proffered definition).

IV. PETITIONER'S PROPOSED DEFINITION OF BURGLARY FOR PURPOSES OF SENTENCE ENHANCEMENT UNDER SECTION 924(e)(2)(B) IS THE ONLY ONE THAT WILL EFFECT CONGRESSIONAL INTENT AND BE CONSISTENT WITH THE LANGUAGE OF THE STATUTE.

The categorical test advanced by petitioner, Pet. Br. at 28-31, is the only way to ensure, without a fact-based inquiry, that enhanced sentences are only given to those persons who have committed a burglary involving a threat of physical injury to another. To reiterate, burglary would be defined as any crime punishable by a term of

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second degree statutes, serve to proscribe violent or potentially violent behavior. *Compare* Mo. Rev. Stat. § 569.160 (1986) (first degree) *with id.* § 569.170 (second degree). As such, the elements of these first degree burglary statutes are consonant with the intent of Congress to limit enhancement under § 924(e) to such conduct, and have been employed by petitioner in setting the parameters of his proposed definition. *See* Pet. Br. at 30-31. Thus, petitioner has suggested that conduct constitutes a serious risk of physical injury to another when the person: (1) enters or remains in an occupied building; (2) is armed with explosives or a deadly weapon, or (3) causes or threatens immediate physical injury to a non-participant. *Id. See* Mo. Rev. Stat. § 569.160. Petitioner, in recognition that mayhem often attends hasty flight, would add a fourth enhancement qualification, *i.e.*, when a burglar flees upon investigation. Pet. Br. at 31.

imprisonment exceeding one year and consisting of entering or remaining within a building that is property of another with intent to engage in a Federal or State offense that involves as an element necessary for conviction, conduct that presents a serious potential risk of physical injury to another. *See United States* v. *Vidaure*, 861 F.2d 1337, 1340 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1551 (1989) ("[A] determination of whether a crime is a violent felony [under Section 924] requires an examination of applicable state law to determine if an element of the crime charged was 'the use, attempted use or threatened use of physical force against the person of another' or '. . . involves conduct that presents a serious potential risk of physical injury to another.'")

We have previously acknowledged that our proposed definition, in ensuring that "non-violent" burglars will not be brought within the sweep of the 1986 Act, may lead to some "violent" burglaries being disqualified as enhancing offenses. Pet. Br. at 31-33. The latter would occur where a person was convicted under a statute that may, but does not necessarily, involve an element that presents such a risk. Most state second degree burglary statutes and a few state first degree burglary statutes fall into this category.

Thus, the effect of petitioner's definition would be that most state first degree burglary convictions would qualify as burglaries under Section 924, while most state second degree burglaries would not. That is because most first degree burglary statutes contain as an element necessary for conviction conduct arguably presenting a serious risk of injury to others, for example:

1. Entering or remaining in an occupied building;
2. Being armed with a deadly weapon or explosives;
3. Causing or threatening immediate physical injury to anyone not a participant in the crime; or

4. Fleeing upon investigation by any person.

See, for example, the first degree burglary statutes in effect in Missouri, both now, Mo. Rev. Stat. § 569.160 (1986), and at the time of Petitioner's second degree burglary convictions. Mo. Rev. Stat. § 560.040 (1969) (repealed).

If this Court does not accept petitioner's definition for fear that some "violent" burglaries will be disqualified from serving as enhancing offenses, considerations of fairness and lenity mandate either that the Court adopt the definition of common law burglary or that, where necessary, factual inquiry be made on a case-by-case basis to ensure that the requisite risk of violence existed in the would-be predicate offenses. *See* Pet. Br. at 33 n.9.

To elaborate on the latter, petitioner reiterates that burglary statutes may be categorized in one of three ways: those that necessarily involve an element that presents a serious potential risk of violence to another person, those that do not, and those that may but do not necessarily involve an element that presents such a risk. Pet. Br. at 31. Under what we will call the "modified categorical approach," convictions in the first category would in fact be handled in categorical fashion. That is, if the statute itself requires conduct that presents a potential risk of physical injury to another person, convictions under these statutes would automatically qualify as predicate offenses under Section 924(e). The second category—statutes which by their terms do not involve a potential risk of violence—would be categorically excluded from serving as predicate offenses.[15]

Convictions under the third category of the burglary statute—those that *may or may not* involve a risk of serious physical injury to others—would be subjected to a

[15] There are relatively few such statutes. *E.g.*, Fla. Stat. Ann. § 810.02.(3) (West Supp. 1989).

factual inquiry at sentencing to determine whether the defendant's specific offense involved a serious risk of physical injury, and therefore is eligible to be a predicate offense under the 1986 Act. The definition of "serious risk of physical injury" is set forth *supra*, pp. 15-16. *See also* Pet. Br. at 30-31.

Such factual inquiries, limited as they are to one category of burglary statutes, would not overburden the judicial system, nor necessarily be inconsistent with standard procedures now used in many federal sentencing hearings. *See United States* v. *Baskin*, 886 F.2d 383, 388-90 (D.C. Cir. 1989). Such an approach would comport with the plain language of § 924(e)(2)(B)(ii). A "violent felony" is defined as a crime that is "burglary . . . or *otherwise* involves *conduct* that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii) (Supp. V 1987) (emphasis added). The term "conduct" may be taken to suggest that the courts, if necessary, may examine the specific acts—that is, the "conduct"—that led to the conviction, in order to determine whether the particular crime qualifies as a predicate offense.

The burden of proof would be on the Government to show that the scrutinized conduct presented such a risk. Such a burden is rightfully imposed, however, where the Government seeks to obtain a mandatory minimum sentence of fifteen years in prison without possibility of parole. It will also have the effect of forcing states to improve their record-keeping procedures, which were less than exemplary in this case. *See infra* pp. 18-19.

Though it would not have the same ease of application as petitioner's suggested "categorical" approach, the "modified categorical approach" described immediately above is founded on the same substantive premise: that only those burglaries necessarily involving a serious risk of physical harm to others should serve as predicates to the drastic sentence enhancement contained in Section

924(e)(2)(B). As such, it is clearly preferable to the definition embraced by the Government, which itself (1) is overbroad, (2) would also require the conduct of mini-trials, and (3) is contrary to Congressional intent.

V. THE CIRCUMSTANCES OF PETITIONER'S CONVICTIONS REQUIRE THIS COURT TO REVERSE AND REMAND FOR RESENTENCING.

The Government contends that petitioner has a prior conviction for a robbery, one for assault, and two convictions (from 1963 and 1971) for burglary second degree under Missouri law. Res. Br. at 3-4 & nn. 2-3. The Government produced certified convictions for the robbery and the two burglaries, but not the assault. J.A. 26-31. Moreover, although the Missouri law in effect at the time of petitioner's burglary convictions provided for seven separate crimes labeled "burglary second degree," Pet. Br. at 6 n. 1, 3a-5a the conviction records do not establish the specific statute under which petitioner was convicted. This determination must be made before the tests advocated by either petitioner or the Government can be applied to establish whether or not the conviction is a predicate offense under Section 924(e)(2)(B). Accordingly, at a minimum this case must be reversed and remanded for determination of the statutory section under which petitioner was convicted.

Under petitioner's categorical test, he is entitled to an outright reversal, because all of the Missouri second degree burglary statutes proscribe both non-violent and potentially violent conduct. *See* Pet. Br. at 33-35. Under petitioner's alternate formulation, the "modified categorical" test, it would be necessary to determine whether his conduct actually presented a serious risk of injury to another—*i.e.*, whether he was armed, whether physical injury was threatened, whether there was one or more persons present in the structure, or whether there was flight upon investigation. From the face of conviction records produced by the Government, these factors do not appear to be present. J.A. 26-27, 30-31.

While the records are at best murky, it is quite possible that both of petitioner's convictions were under the former section that applied to burglaries other than dwellings. J.A. 11 (1971 conviction was for unarmed break-in of a closed, unoccupied gas station); *id.* at 26-27 (1963 conviction provided as condition of probation that defendant make restitution of $15.25 to Wilkins Food Shop). *See* Mo. Rev. Stat. § 560.070 (1969) (repealed) (the only second degree burglary statute then in effect that applied to structures other than a dwelling house, a vacant building not containing valuable goods, or a bank). *See also* J.A. 11 (circumstances surrounding the 1965 [sic—1963] conviction are unclear, and clarifying records could not be located). Absent proof that petitioner's burglary convictions involved conduct posing a serious threat of physical injury to another, reversal is warranted under the modified categorical test as well.

Even under the Government's test, remand is required to ascertain the circumstances of petitioner's burglary convictions. The government has never established that petitioner *entered or remained in a building*. To the contrary, the circumstances surrounding the 1963 conviction are unclear. As noted, the cryptic "Order Granting Probation" mentions restitution to a food shop. The Probation Officer claims that petitioner told her that, in connection with the 1963 conviction, he travelled to, but did not enter, the residence of a friend's girlfriend.[16] In peti-

[16] It should be noted that in 1987 petitioner's ability accurately to recall events as recent as 1986 was so poor that his counsel made a motion for a physical and mental examination of defendant, and the District Court ordered petitioner to be sent to the Springfield, Missouri medical center to determine his competence to stand trial. Record Vol. I, Items dated July 31 and August 3, 1987. Any recollection that petitioner may have related to the probation office about the 1963 offense is inherently suspect and should not be considered probative without some kind of corroboration. This is especially true since the episode allegedly described by Petitioner is not specifically mentioned in the conviction records upon which the Government relies.

tioner's 1971 burglary conviction, petitioner did not enter the subject service station, which was closed and unoccupied at the time. J.A. 11.

Absent clear evidence that petitioner's burglary convictions involved conduct posing a serious threat of injury to others, they cannot be deemed "violent felonies" for purposes of § 924(e) enhancement. Therefore, reversal and remand for resentencing, without the possibility of enhancement, is mandated. Even if the Court chooses to accept the Government's broad (and we suggest overbroad) test, remand is necessary in order for the Government to attempt to prove the circumstances of the underlying burglary convictions, so as to demonstrate that one or more of them meets its own definition.

VI. CONCLUSION.

For these reasons, petitioner respectfully requests the Court to reverse the judgment below and to remand the case to the District Court for resentencing under 18 U.S.C. § 924(e)(1) (Supp. V 1987) (subsequently amended by 18 U.S.C.A. § 924(e)(1)) (West Supp. 1989).

Respectfully submitted,

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

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Respondent.

ON WRIT OF CERTIORARI TO
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AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

WHETHER BURGLARY (REGARDLESS OF ITS STATE LAW DEFINITION) IS A "VIOLENT FELONY" AS THAT TERM IS USED IN 18 U.S.C. 924(e)(2)(B)?

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STATEMENT OF INTEREST

OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia Non-Profit Corporation with a nation-wide membership of more than 5,000 lawyers. The NACDL was founded over 25 years ago to advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence and expertise of criminal defense lawyers.

Among the NACDL's stated objectives is the promotion of the proper administration of criminal justice. A cornerstone of this organization's objectives, and of the criminal justice system, is the consistent application of federal criminal statutes. The NACDL is very concerned about the conflict among the circuits, as indicated in this case, which undermines the organization's objectives and creates serious constitutional questions. Furthermore, the varying applications

of the enhancement statute in question results in disparity in sentencing thereby undermining the objectives of the new Sentencing Guidelines. This brief supports the petitioner's arguments that the decision below should be reversed and remanded for resentencing.

Both parties have consented to the filing of this Amicus Curiae Brief.

SUMMARY OF ARGUMENT

The Eighth Circuit Court of Appeals should not have affirmed the enhancement of petitioner's sentence without first determining whether petitioner's prior burglary convictions constituted "violent felonies" as that term is used in 18 U.S.C. § 924(e)(2)(B). In holding that Congress meant that any burglary, regardless of its definition or denomination by a state legislature was a "violent felony", the Court changed the meaning of conduct specifically addressed by the states. The district court, at sentencing, should have required the government to prove by a preponderance of the evidence that petitioner's prior burglary conviction was a crime of violence or one in which there was a serious potential risk of injury to another.

ARGUMENT

NOT EVERY BURGLARY IS A "VIOLENT FELONY" AS THAT TERM IS USED IN 18 U.S.C. § 924(e)(2)(B).

Petitioner pleaded guilty to possession of a firearm by a previously convicted felon in violation of 18 U.S.C. § 922(g)(1). The government sought enhancement of petitioner's sentence under 18 U.S.C. § 924(e)(1) inasmuch as petitioner had two previous convictions for second degree burglary under Missouri state law, one previous state conviction for robbery and two previous state convictions for assault. At sentencing the government agreed with petitioner that one of the two state assault convictions should not be considered relative to enhancement since that conviction had not been verified.

Petitioner conceded that his robbery conviction and the remaining assault conviction each qualified as a "violent felony" under the enhancement provisions. Petitioner contended at the sentencing hearing that his two burglary convictions were not proper predicate offenses under § 924(e)(1) and § 924(e)(2)(B)(ii) because those crimes did not involve actual or potential injury to others.

It is not clear from the record what petitioner's conduct was that resulted in his state burglary convictions. He was convicted in 1963 and the government's notice of enhancement stated only that he had been convicted of burglary in the second degree under Missouri law without specifying circumstances of the crime. In 1963, at the time of his conviction, there were seven separate Missouri statutes describing conduct which could be burglary in the second degree. The conduct described varied from

breaking into an unoccupied dwelling house (§ 560.045), breaking out of a dwelling house (§ 560.050), breaking an interior door (§ 560.055), burglary after being admitted with consent (§ 560.060), breaking and entering enclosures besides dwelling places (§ 560.070), breaking into a bank building (§ 560.075) and breaking and entering into vacant buildings (§ 560.080). There was a separate statute for burglary in the first degree (§ 560.040) and burglary with explosives (§ 560.100).

Regardless of the statute under which petitioner was convicted for second degree burglary, it is the position of the amicus that by the language of 18 U.S.C. § 924(e)(1) the government should have the burden of proof by a preponderance of the evidence of showing that the conduct in which the petitioner engaged was violent. Given the varieties of conduct which could constitute burglary in Missouri, without

even considering the numerous categories established by the other states, simply restating the fact of conviction should not be allowed to support enhancement of a sentence. It is for this reason that United States v. Portwood, 857 F.2d 1221 (8th Cir. 1988), cert. den'd, 109 S.Ct. 2073 (1989), the Eighth Circuit opinion in this case, and United States vs. Dickerson, 857 F.2d 414 (7th Cir. 1988) are wrong. These cases assume that all burglaries involve conduct "that presents a serious potential risk of physical injury to another." This assumption cannot be supported, as demonstrated by the Missouri statutes. This approach is far too simplistic.

The Fourth Circuit has enunciated the rule in United States vs. Headspeth, 852 F.2d 753, 757-8 (4th Cir. 1988) that "burglary" as used in 18 U.S.C. § 924(e)(2)(B)(ii) means only burglary as it was defined at common law; that is, the breaking and entering of the dwelling house of

another, in the nighttime, with the intent to commit a felony therein. Obviously this definition does not include any commercial burglary and various other conduct. We believe that 18 U.S.C. § 924(e)(2) is not so restrictive.

The Eleventh Circuit, in United States vs. Hill, 863 F.2d 1575 (11th Cir. 1989) has held that burglary means "any felony consisting of entering or remaining surreptitiously within a building which is the property of another with intent to engage in conduct constituting a Federal or State offense." Id at 1578. Thus, the Eleventh Circuit's definition mirrors the common law definition except that it broadens it to include the term "building" rather than just "dwelling house". This holding is too broad because it could enhance a defendant's sentence for conduct which was not violent. Furthermore, that court adopted a definition of burglary specifically abandoned by

Congress. Hill, supra at 757-58. "Burglary" is not defined in 18 U.S.C. § 924(e).

In United States vs. Sherbondy, 865 F.2d 996 (9th Cir. 1988) the Ninth Circuit opted for a compromise and held, similarly to United States vs. Portwood, supra, that Congress meant to include certain categories of crimes, regardless of their various definitions, and that criminal conduct not within one of those categories should be examined by the sentencing court to determine whether or not the applicable state statute covered only conduct that was "otherwise violent". In other words, if a state statute covered conduct outside of one of the categories listed in § 924(e)(2)(B)(ii) (burglary, arson, extortion) that could be criminal whether it was violent or not violent, a conviction under that statute could not serve as the basis of enhancement because the state statute would be overly broad. Id. at 1011.

Amicus respectfully submits that the analyses applied in the above cases from the various circuits does not accomplish what congress admittedly intended; that is, to enhance punishment for persistently violent or drug offenders. No matter how carefully one wants to review the legislative history of § 924 (Cf. United States vs. Hill, supra; United States vs. Sherbondy; supra; and United States vs. Taylor, 864 F.2d 625 (8th Cir. 1989) (Bright, J., dissenting) it is clear that Congress wanted longer sentences imposed upon those persons previously engaged in a number of crimes of violence, crimes where there was a serious potential risk of injury to another, serious drug crimes, or any combination of the three. That being the case, and more particularly concerning the facts in this case, we submit that the sentencing court should determine in what violence, if any, the petitioner engaged so that it

can properly make its determination as to whether or not to enhance punishment. Consequently, we respectfully submit that a holding by this Court that at sentencing, the burden of proof is on the government to show by a preponderance of the evidence that the underlying conviction(s) is one of violence or one in which there was a serious potential risk of injury to another, or was a serious drug offense, regardless of how the state characterizes or labels the offense, meets the intent of congress and provides petitioner the opportunity to a fair hearing on substantial issues and ensures the protection of due process of law.

Such a holding will not overburden the courts nor cause any calamity within the judicial system. Indeed, such a process is not even novel. Rather, requiring this kind of determination to be made by the district court is entirely consistent with the many kinds of hearings now held for sentencings. Cf. United

States vs. Baskin, 886 F.2d 383 (D.C. Cir. 1989). Mini-trials would not be required as the government may be able to show that the statute under which a defendant was convicted criminalized only violent conduct. Coupled with the fact of conviction the requirements of §924(e)(2)(B) would be met. Admittedly, in some cases more would have to be shown by the government. However, this is not a heavy burden given that the government is seeking a mandatory minimum, non-parolable fifteen year sentence.

CONCLUSION

For the foregoing reasons and authorities in support thereof, the decision of the United States Court of Appeals for the Eighth Circuit should be reversed and this cause be remanded the United States District Court for the Eastern District of Missouri, Eastern Division, for resentencing in accordance with the position of the Amicus Curiae expressed herein.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I BURTON H. SHOSTAK, a member of the Bar of this Court, being first duly sworn under oath declare that the 40 copies of the foregoing Amicus Curiae Brief were served by depositing them in a United States mailbox with first class postage prepaid, addressed to Joseph F. Spaniol, Clerk, Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543; and that at the same time three copies were placed in the same mailbox postage prepaid and addressed to Bruce David Livingston, Esq., Attorney for Arthur LaJuane Taylor, 100 North Broadway, Suite 2000, Suite 2000, St. Louis, Missouri 63102, and Kenneth W. Starr, Esq., Solicitor General, United States Department of Justice, Washington D.C. 20530, Attorney for Respondent. Affiant swears that this Amicus Curiae Brief was deposited by affiant in the mailbox located at the Clayton Branch Post Office in the City of St. Louis, Missouri on November 24, 1989

Burton H. Shostak

SUBSCRIBED AND SWORN TO before me this 24th day of November, 1989.

Notary Public

MY COMMISSION EXPIRES:

NOTA[illegible]

MY C[illegible]